Supreme Court, U.S.
FILED

No. 09-632 NOV 24 2009

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In The

Supreme Court of the United States

ERLINDA DOMINGUEZ,

Petitioner,

v

PRICE OKAMOTO HIMENO & LUM, a Law Corporation,

Respondent

On Petition For A Writ Of Certiorari To The Intermediate Court Of Appeals Of The State Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

ERLINDA DOMINGUEZ
P O Box 1717
Duarte, CA 91009-4717
(808) 224-8890

Petitioner Pro Se

Date 11-24-2009

QUESTIONS PRESENTED FOR REVIEW

The parties were attorneys for a couple ("clients") in the U.S. District Court for Hawaii. The clients sued Petitioner in a State Court for malpractice errors and prevailed. Petitioner sued Respondent for indemnification.

1. WHETHER THE COURT BELOW CAN ADMIT THE JAPAN "DEFAULT" JUDGMENT AND JAPAN LAWS THAT WERE NOT PLEADED AND NOT ATTESTED AS AUTHENTIC.

2 WHETHER THE COURT BELOW CAN RECOGNIZE THE JAPAN JUDGMENT AS VALID WHEN THE DEFENDANTS (CLIENTS) WERE NOT SERVED JAPAN PROCESS.

3. WHETHER THE COURT BELOW CAN RULE THAT THE JAPAN JUDGMENT BARS PETITIONER'S CLAIMS WHEN THE PARTIES WERE STRANGERS TO THE JUDGMENT AND RES JUDICATA REQUIREMENTS ARE ABSENT.

4 WHETHER THE COURT BELOW CAN DECIDE FOR THE FEDERAL COURT AND THE JAPAN COURT THAT THE FEDERAL JUDGMENT CANNOT BE COLLECTED IN JAPAN

5. WHETHER THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT BASED ON FACTS UNSUPPORTED IN THE RECORD.

LIST OF PARTIES

The Parties named in the proceedings below are:

1. ERLINDA DOMINGUEZ
   Plaintiff (herein Petitioner)

2. ERLINDA DOMINGUEZ, dba
   LAW OFFICES OF ERLINDA DOMINGUEZ,
   Plaintiff (the dba Offices had been identical with Erlinda Dominguez as sole proprietor, has been defunct and now non-existent, and is not part of the judgment below.

3. PRICE OKAMOTO HIMENO & LUM, a Law Corporation
   Defendant (herein Respondent)

The "dba" Law Offices, a description of Petitioner, has no interest in the outcome of this Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE CONSTITUTIONAL AND FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE PROPERLY PRESENTED AND DECIDED	6
II THE DECISION OF THE COURT BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON PLEADING A JUDGMENT	7
III THE DECISION OF THE COURT BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON RENDITION OF SUMMARY JUDGMENT	9
A. The Japan Judgment Was Not Authenticated	9

TABLE OF CONTENTS – Continued

Page

B. The Japan Laws Were Inadmissible Exhibits 10

C. Petitioner Had No Due Process Hearing 11

IV THE JAPAN JUDGMENT WAS VOID AND HAD NO EFFECT 11

V. THE APPLICATION OF PRECLUSION AGAINST PETITIONER CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 13

VI. THE COURT BELOW INFRINGED ON FEDERAL PROCEEDINGS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT 14

VII. THE DECISION OF THE COURT BELOW PROMOTES COLLUSIONS FOR "DEFAULT JUDGMENTS" IN FOREIGN COUNTRIES 15

VIII. THE DECISION BELOW DICTATES IN JAPAN SOIL, BREACHES JAPAN'S SOVEREIGNTY, IS A NULLITY AND IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT 16

CONCLUSION 19

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

Summary Disposition Order of the Intermediate Court of Appeals filed Apr. 29, 2009 ... ..App. 1

Order Granting Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's First Amended Complaint (Filed on 12/14/05) of the Circuit Court filed Mar 1, 2006. .. .. App 20

Judgment of the Circuit Court filed Sep. 6, 2006 .. .. App. 24

Order Denying Motion for Reconsideration of Order Granting Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's First Amended Complaint (Filed March 1, 2006) (Filed on March 6, 2006) of the Circuit Court filed Apr. 25, 2006 .. ..App 28

Order Denying Motion for Reconsideration of the Intermediate Court of Appeals filed June 1, 2009 .... App. 30

Judgment on Appeal of the Intermediate Court of Appeals filed Jun 5, 2009. . .. .App. 32

Order Rejecting Application for Writ of Certiorari of the Supreme Court filed Sep 1, 2009 ....App. 34

U S Const. Article V . .. .App. 36

U.S Const Article XIV... ....App. 36

28 U.S.C. § 1741 . .. . App 37

TABLE OF CONTENTS – Continued

Page

Rule 902, FRCP .. . .App. 37

Article 108-109, Japan Code of Civil Procedure . . .. App. 39

Article 118, Japan Code of Civil Procedure... ..App. 39

Plaintiff's Objections to Defendant Price Okamoto Himeno & Lum's Issues of Any Japan Law, Order, Judgment, and U.S Diversity Jurisdiction, as These Defenses Were Not Affirmatively Raised in Its Answer to Complaint [defendant filed on Mar. 10, 2004] filed Dec 22, 2005.. .. . . .App. 40

TABLE OF AUTHORITIES

Page

CASES

Adams v Robertson, 520 U.S. 83, 117 S Ct 1028 (1997) 6

Adickes v Kress & Co., 398 U.S. 144 (1970) 10

Arizona v. California, 530 U.S. 392 (2000).....8, 13

Bhakta v County of Maui, 109 Haw. 198, 124 P.3d 943 (Hawaii 2005).... 7

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434 (1971).. 8

De Saussure v Gaillard, 127 U.S 216, 8 S.Ct. 1053 (1888) 6

Donovan v City of Dallas, 377 U.S 408 (1964).... ... 14

Galpin v. Page, 85 U.S. 350, 1873 WL 16036 (1873)..... ... . 12, 18

Hansberry v Lee, 311 U S. 32, 61 S Ct 115 (1940) 12, 13, 14

Hilton v Guyot, 159 U S. 113, 16 S.Ct 139 (1895). 7, 13, 18

Michigan v Long, 463 U.S. 1032 (1983).. 6

Pennoyer v. Neff, 95 U S. 714, 1877 WL 18188 (1877).. .. . . 12, 13

Reynolds v. Stockton, 140 U.S. 265 (1890) 17

Ritchie v. McMullen, 159 U.S. 235 (1895) 7

State v. West, 95 Haw. 452, 24 P.3d 648 (Hawaii 2001). 10

TABLE OF AUTHORITIES – Continued

Page

Takaki v Allied Machinery Corp , 87 Haw. 57, 951 P 2d 507 (Haw. Ct. App. 1998) 9, 10

United States v Diebold, Inc., 369 U.S 654 (1962)..... .10

Windsor v. McVeigh, 93 U S. 274 (1876) ..... .17

CONSTITUTION AND FEDERAL STATUTES

U S. Const. Art. V 2, 13

U S. Const. Art. XIV 2, 14

28 U.S.C § 1257 2

28 U S.C § 1741 ....2, 9

Uniform Foreign-Country Money Judgment Recognition Act, § 6 7

RULES

Rule 8(c) Hawaii Rules of Civil Procedure 7

Rule 9(d) Hawaii Rules of Civil Procedure..... ..7

Rule 9(e) Hawaii Rules of Civil Procedure 7

Rule 13.1, Supreme Court Rule 2

Rule 40.1, Hawaii Rules of Appellate Procedure 2

Rule 56, Hawaii Rules of Civil Procedure 9

Rule 56(c), Hawaii Rules of Civil Procedure ..... .10

Rule 56(e), Hawaii Rules of Civil Procedure 9

Rule 902(3), Federal Rules of Civil Procedure 2, 9

TABLE OF AUTHORITIES – Continued

Page

FOREIGN AUTHORITIES

Article 108-109, Japan Code of Civil Procedure. 11

Article 118, Japan Code of Civil Procedure 17, 18

Article 175, Japan Code of Civil Procedure 12

Article 200, Japan Code of Civil Procedure.. 17

PETITION FOR WRIT OF CERTIORARI

This petition seeks a review of the decision of the Intermediate Court of Appeals of the State of Hawaii, affirming the summary judgment of the trial court absolving Respondent from indemnifying Petitioner for a legal malpractice judgment.

OPINIONS BELOW

The unreported Decision, Summary Disposition Order of the Intermediate Court of Appeals, is App. 1 [1] Its Order Denying the Motion for Reconsideration is App. 30. Its Judgment on Appeal entered on June 9, 2009 is App 32

The trial court Order granting summary judgment for Respondent is App 20. Its Order denying Petitioner's Motion for Reconsideration is App. 28. Its Judgment appealed to the Intermediate Court of Appeals is App. 24.

The Order of the State Supreme Court denying the Application for Writ of Certiorari to the Intermediate Court of Appeals timely filed by Petitioner on July 22, 2009, was entered on September 1, 2009 and is App 34

[1] "App " refers to Appendix hereto, "R " to Record on Appeal in Court below, "v " the volume, "Tr " to transcript in trial court

In this petition, "Court below" refers to the Intermediate Court of Appeals to which this Petition is directed

JURISDICTION

This Petition was filed within ninety days from the Sept. 1, 2009 denial of the State Supreme Court for discretionary review.[2] The jurisdiction of this Honorable Court is invoked under 28 U.S C. § 1257 and Supreme Court Rule 13.1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In pertinent part, the Fifth Amendment of the Federal Constitution provides that no person shall be deprived of life, liberty, or property without due process of law, the Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property, without due process of law nor deny the equal protection of the laws (App. 36)

In pertinent part, 28 U S C. § 1741, provides that an official record or document of a foreign country may be evidenced or authenticated as provided in the Federal Rules of Civil Procedure; and Rule 902(3), FRCP, provides authentication as a condition to admissibility by execution or attestation in an official capacity by a person authorized by the laws of the foreign country (App. 37).

[2] Under Rule 40 1, Hawaii Rules of Appellate Procedure, "Application" for writ of certiorari in the State Supreme Court is the "Petition," "rejected" is "denied " Parties are called Petitioner and Respondent

STATEMENT OF THE CASE

The parties are attorneys who represented a couple (herein "clients"), plaintiffs in a product defect injury case in the U.S District Court for Hawaii In 1993, a default judgment was rendered against the defendant Japan Company for about $485,000 [3] In 1999, the clients sued Petitioner in a State court for legal malpractice. They claimed that she did not name a third party, did not properly serve the Japan Company, nor defend them in a Japan Court. (App. 3). Respondent was not sued, it signed a tolling agreement. Clients prevailed against Petitioner for about $1.5 million which included the sum of the federal judgment accruing interest from its rendition. (App. 3).[4] In 2003, Petitioner sued Respondent for indemnification (R., v.1 at 1-13). In 2005, Respondent filed a Motion for Summary Judgment and claimed that the federal judgment is uncollectible because

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[3] The U S Dist Court case was *Barnedo & Barnedo v Marukiku*, Civ 89-00730 In 1993, before the federal judgment, the clients retained Respondent to co-counsel with Petitioner (R , v 4 at 242-243) The parties signed their fee split in 1994 and dissolved their relationship in 1996, with the case ending in Respondent's control (*Id* R at 248-254, Appendix A & B to Opening Appeal Brief)

[4] The malpractice case was *Barnedo v Dominguez, et al* , Civ 99-2847-07 filed in a State Court when the clients were domiciled in another State During trial, the presiding Judge disclosed that her attorney husband was working in Respondent firm before its partner Okamoto began his testimony (R , v 4 at 325) She denied Petitioner's Motion for her Recusal and stepped aside after execution This Court denied writ to the State Court, Pet 06-883 filed 2006

Petitioner did not serve the Japan Company through the Hague Convention Treaty provision (R., v.3 at 60-64). It further claimed, without providing law in support, that a 1992 default judgment in Japan against the clients rendered before the parties' liaison, barred the collection of the 1993 federal judgment that the parties earned; thus, Respondent is not liable (*Id* R. at 61-64). This Japan judgment defense was not in the pleadings. (R., v.1 at 1-13; 15-30; 37-51; 56-62). Respondent's counsel declared that a print of the unsigned, unsealed and unattested judgment in Japanese language was a true copy (R , v.3 at 167). His paralegal translated into English. (*Id.* R. at 266-269). Petitioner raised her federal questions, as follows: (1) She filed objections to issues of Japan Law, Order, Judgment, as these were not raised in the pleadings (R., v 4 at 12-14; App. 40); (2) She filed an opposition on these grounds: There was failure to plead the above affirmative defenses, and Respondent's exhibits were not authenticated; the Japan judgment is void as the clients were not served Japan summons or process; Respondent had no standing, the parties were not part of the Japan judgment; estoppel or preclusion cannot attach; the federal judgment is collectible and any malpractice errors could have been corrected by Respondent who controlled the litigation. (R., v.4 at 148-158). Petitioner preserved her objections at hearing. (R., v 4 at 142, 145). She was overruled when Respondent's motion was granted. (R., v.5 at 265-268; App. 20). The trial court held that the Japan law (and judgment) "is

relevant to Defendants' denial of causation" and "is not an affirmative defense" (that had to be pleaded); the (1992) Japan judgment was authenticated by the 1991 letter of Kuwahara to the Japan Court, and "the Japan judgment is utterly preclusive of Plaintiff's claims "[5] (App 22). In her Motion for reconsideration of the issues, Petitioner quoted from Respondent's authority: Such judgment without court jurisdiction "is repugnant to the public policy of the United States" and "conflicts with another final judgment that is entitled to recognition." (R., v6 at 6). The Motion was not heard and was denied. (R., v.7 at 169-171; App. 28). Petitioner's issues were presented in her appeal briefs (Opening Brief at 24-32; Reply Brief at 7-9), in her Motion for Reconsideration (at 1-7) summarily denied (App. 30); in her Application for writ to the Court of Appeals, rejected by the Supreme Court (App 34).

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[5] Associate Kuwahara informed the Japan Court through the clerk of the federal lawsuit and stated, the letter was not an appearance. THE NO APPEARANCE IS NOT DISPUTED (R, v 3 at 127-129) Petitioner uses parentheses above to clarify what the appeal Decision and the trial court Order did not completely state, as dates and descriptions (App 8-9, App 21-22)

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL AND FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE PROPERLY PRESENTED AND DECIDED.

The issue must have been addressed by the highest Court or that it was properly presented to the State Court that rendered the decision that this Court is asked to review. *Adams v. Robertson*, 520 U S. 86-87 (1997) It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it *De Saussure v Gaillard*, 127 U S. 234 (1888). The Court below *admits* that Petitioner presented her federal issues in the "correct application of the U.S. and Japan laws" and enumerated assigned errors. (App. 6-7) They included U.S. and Japan laws on judgment preclusion; failure to plead defenses; admission of exhibits; absence of facts, law, court authority, all determinative of Petitioner's due process The Court below reviewed the "record and briefs" and has "given due consideration to the arguments and the issues raised." (App. 8). Petitioner's issues had to be decided to arrive at the determination of the cause. This Court has jurisdiction whenever a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law. *Michigan v Long*, 463 U.S. 1040-1041 (1983).

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON PLEADING A JUDGMENT.

If a defendant defends upon the foreign judgment, he must plead it. There must be an "action on the judgment." *Ritchie v. McMullen,* 159 U.S 235, 237 (1895) See also *Hilton v. Guyot,* 159 U S. 113, 205, 227 (1895); and § 6, Uniform Foreign-Country Money Judgments Recognition Act, which requires filing an action for judgment recognition. Hawaii Civil Rules of Procedure (HRCP) require pleading of any avoidance or affirmative defense, judgment or decision of a domestic or foreign court without qualification, and Res Judicata. See Rules 8(c), 9(d)-(e), HRCP, all repeatedly presented. But the trial court said, Japan law (and judgment) is "relevant to Defendants' denial of causation" and is not affirmative defense (App. 22) The Court below affirmed and held: "POHL was not required to plead Japan law and/or the Japan action as an affirmative defense, since those matters were used to negate the causation element of Dominguez's claims against POHL (Respondent) " (App. 8). It relied on an inapplicable case of *Bhakta v County of Maui,* 109 Haw 198, 124 P 3d 943 (Hawaii 2005), where therein issue was tried "with consent of the parties" over a local act providing the elements of a State's duty of care in accident cases. *Id.* 124 P.3d 956. The Court below said, " . . . there is nothing in the record establishing that POHL could have executed the U.S. District

Court judgment . . " (App. 9). This conclusion, with no name, was the appeal issue of preclusion from the trial court Order that said: "The Japan judgment is *utterly preclusive of Plaintiff's claims* " (Emphasis provided, App 22). Res Judicata or estoppel of judgment are legal terms avoided by the Court below.

"*Res Judicata* and collateral estoppel are affirmative defenses that must be pleaded." *Blonder-Tongue Laboratories, Inc v. University of Illinois Foundation,* 402 U.S 350 (1971). The purpose "is to give the opposing party notice of the plea of estoppel and a chance to argue why imposition of an estoppel would be inappropriate." *Id.* at 350. This Court abhors failure to plead the defense when the party "had every opportunity, and every incentive" to press the preclusion argument at earlier stages. *Arizona v. California,* 530 U.S. 409 (2000). "Those principles rank res judicata an affirmative defense ordinarily lost if not timely raised. . We disapprove the notion that a party may wake up because 'a light finally dawned' . . . " *Id* at 410. In the 2003 malpractice trial, Respondent's partner Okamoto testified that he was working with a Japan law firm to collect. (R , v.4 at 325-333) He must have known and avoided deposition before Respondent's motion in 2005. (R., v.2 at 141-146)

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON RENDITION OF SUMMARY JUDGMENT.

A. The Japan Judgment Was Not Authenticated.

28 U S C § 1741, provides that an official record of a foreign country must be authenticated pursuant to the Federal Rules of Civil Procedure. Rule 902(3), FRCP, requires execution or attestation in an official capacity by a person authorized by the laws of the foreign country. (App. 37). Respondent's motion was under Rule 56, HRCP. (R , v 3 at 44-64). The affiant must have personal knowledge of admissible facts and his competence to testify thereof must be affirmatively shown. See Rule 56(e), HRCP. Respondent's counsel and his paralegal had no personal knowledge but declared that their exhibits were true. (*Id.* R at 71-78, 248-250). In deciding that the Japan judgment is valid and authentic, the Court below said, the (declared) exhibits "may be considered" with the 1991 letter of Kuwahara to Japan even if the letter is "not authenticated."[6] (App. 9). No law was mentioned how the 1991 letter in English by a stranger, could authenticate the future 1992 judgment in Japanese language The Court below relied on an out-of-point case of *Takaki v. Allied Machinery Corp* , 87 Haw. 57, 951 P.2d 507 (Haw Ct. App 1998) for wrongful

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[6] Letter (R , v 3 at 127-129) WAS ALWAYS OBJECTED TO (R , v 10, Tr 1/19/06 at 33-34)

discharge of employee, where the parties agreed to a document (not judgment) in a memorandum. *Id* 951 P2d at 519.

B. The Japan Laws Were Inadmissible Exhibits.

Respondent called its exhibits, in untranslated Japanese language, portions of the Japan Code of Civil Procedure (R , v.3 at 130-134; 165-166, 168-169; 204-205). Their counsel's paralegal did not translate, but filed purported portions of the Japan Code in English language, of unknown origin (*Id.* R. at 254-265) The bulk referred to unrelated matters as bankruptcy, appeal briefs, court arguments, settlements Respondent also submitted periodicals in English language from the "internet" where Japanese authors explained the style of Japan litigation. (*Id* R. at 135-164; 206-222; 224-229) Respondent had no law on "preclusion of judgment" in Japan The Court below then held that the admission of Japan law was a judgment call of the trial judge, citing a criminal sexual assault case, *State v West,* 95 Haw. 452, 24 P.3d 648 (Hawaii 2001), where admissibility of false allegations relevant to the complainant's credibility was in issue. *Id* 24 P.3d at 653. (App. 8). "The absence of genuine issue of material fact," a requisite for summary judgment, was absent. *United States v Diebold, Inc.,* 369 U.S. 654-655 (1962). Such shift of burden was "not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact." *Adickes v. Kress & Co.*, 398 U S. 159 (1970).

C. Petitioner Had No Due Process Hearing.

A litigant facing small fine is entitled to an interpreter if he did not speak Japanese. Petitioner was Pro Se with no co-counsel, was losing her property and livelihood. Petitioner did not speak, read or understand Japanese. The paralegal of Respondent's counsel translated the Japan judgment and the Japan lawsuit. (R , v 3 at 251-253; 266-269). Respondent's purported English version of portions of Japan law had no discernable connection to those in Japanese language. (*Id.* R at 254-265). There was no independent translator or legal expert. The Court below decided "the effect" of the Japan judgment "under Japan law," then, deprived Petitioner of a trial (App. 9-10). Everything was by Respondent, its multiple attorneys, the paralegal and the Court. Petitioner had no "Day in Court "

IV. THE JAPAN JUDGMENT WAS VOID AND HAD NO EFFECT.

In abundance of caution, without waiving her objections, Petitioner filed the pertinent Japan laws in English that arrived from Japan (R , v.4 at 320-324). Article 108 of the Japan Code of Civil Procedure (JCCP) provides that "service in a foreign country is by entrustment of the presiding judge to the competent government authorities of that country or to therein Japanese ambassador, minister, or consul," and its Article 109 requires detailed proof of service filed in the Japan Court. (App. 39). Article 108 (JCCP)

was identical to what Respondent called Article 175 (JCCP). (R., v.3 at 263-264). Petitioner also filed the malpractice trial and deposition testimonies, and affidavits of the clients (defendants in Japan). They testified that they were not served Japan process; they received one mail from Japan containing a lawsuit in Japanese language without summons and brought it to Petitioner's office. (R., v.4 at 210-227). Respondent agreed, and submitted a copy provided to them by "Petitioner's malpractice defense counsel" (R., v3 at 123-126) The paralegal's translation into English showed the absence of summons. (*Id.* R. at 251-253). All exhibits were admitted (App. 9). With these undisputed facts of "absence of process" even under Japan law, the Court below decided that the Japan judgment was valid and effectively bars collection of the federal judgment, even if "no one tried to enforce it." (App. 9-10). A party is not bound without service of process. *Hansberry v. Lee*, 311 U.S. 40-41 (1940). A void judgment when rendered will always remain void. *Pennoyer v Neff*, 95 U.S 728 (1877) There is no presumption of law from the existence of a judgment that process was served. *Galpin v. Page,* 85 U S. 359, WL 16036 (1873). "When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point" *Id.* at 366.

V. THE APPLICATION OF PRECLUSION AGAINST PETITIONER CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Court below held that the Japan judgment bars collection of the U.S. District Court judgment, thus, Respondent is not liable to Petitioner No law or doctrine was mentioned to support this leap of conclusion (App. 9-10). Petitioner pressed upon the requirements of Res Judicata to which, Respondent had no counter-arguments. "Preclusion of judgment" refers to "Res Judicata" *Arizona v California,* 530 U.S. 410 (2000) It was a doctrine totally avoided by Respondent in spite of Petitioner's repeated arguments Petitioner was not a party or privy in the Japan action Neither was Respondent. The parties and the cause of action in the first (Japan case) and subsequent action (this case) "must be identical," and the previous final judgment was a "judgment on the merits" before the previous judgment could be given preclusive effect. *Hilton v. Guyot,* supra, at 202-203. The Japan "default" judgment was of a different cause. (R., v.3 at 167; 266-269). The Japan action was *in personam* since "the entire object was to determine the personal rights and obligations of the defendant." *Pennoyer v. Neff,* supra, at 727. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 40-41 (1940), citing *Pennoyer v. Neff*, 95 U.S 714. "[J]udicial action

enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require" *Id.* at 41. Along with Respondent, the Court below disregarded *all* the relevant decisions of this Court Petitioner presented on Res Judicata as if they did not exist [7]

VI. THE COURT BELOW INFRINGED ON FEDERAL PROCEEDINGS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The Japan action and herein action are *in personam* as discussed. The established judicially declared rule is "that state courts are completely without power to restrain federal-court proceedings in *in personam actions.*" *Donovan v. City of Dallas,* 377 U S. 412-413 (1964) "And whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide." *Id* at 412. It does not matter whether the prohibition is "addressed to the parties rather than to the federal court itself." *Id.* at 413. Here, it was addressed to the clients in the federal case (not parties herein), with Respondent as a self-assigned privy of the Japanese Company who sued its clients in Japan. Respondent's motion resulted in an injunction to collect what belonged to the clients This restraint to collect retroacts to 1992,

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[7] Res Judicata is MANDATED TO BE PLEADED Rule 8(c), Hawaii Rules, Civ Proc

date of the Japan judgment, illegally nullifying efforts of the federal court toward its 1993 federal judgment and thereafter (App 2).[8]

VII. THE DECISION OF THE COURT BELOW PROMOTES COLLUSIONS FOR "DEFAULT JUDGMENTS" IN FOREIGN COUNTRIES.

If Courts recognize default judgments as "preclusive," rampant collusions could occur in foreign countries, out of reach of litigants. Foreign investors could be immune from liability while they make huge profits in this country and their products kill or maim people (R., v 3 at 71-72, 79-102, federal lawsuit) Lawyers need not fear malpractice The State Court would make them privy to their opponent. Federal judgments are barred before or after they are rendered. It is irrelevant that the federal proceedings are complex, that the foreign country recognizes United States judgments, that the foreign default judgment is dormant, amended, discarded, or, there are proceedings still happening from the federal lawsuit anywhere. The Court below did not distinguish as it rendered a blanket bar by mere motion, and restrained the federal judgment from enforcement (App. 9) Contrary to, or absence of facts and

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[8] The lower court characterized the Japan judgment as "declaratory" judgment adding to the trial court description of "Japan judgment " (App 2, 21-22)

law on record was the basis of a defense that was never pleaded

The decision below is unpublished, may be for persistency or unlimited flexibility, but is critically significant. Foreign investors and litigants are acutely aware through the "internet," the "source" of Respondent's research. (R., v.3 at 75; 77). The decision below is the greatest judicial tool of foreign investors to a nationwide economic damage of this country. The Japan Company was absolved by the Court below, without having to appear This Honorable Court must intercede.

VIII. THE DECISION BELOW DICTATES IN JAPAN SOIL, BREACHES JAPAN'S SOVEREIGNTY, IS A NULLITY AND IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

Respondent had no defense that it could and should have rectified the malpractice errors. Thus, it pursued the one affirmative defense of Res Judicata it failed to plead· the Japan judgment is a bar to the federal judgment. (App 8-10; 22). The dispositive portion of the decision below states: "POHL was entitled to summary judgment as a matter of law. . *In light of the Japan judgment and its effect under Japan law,* there is nothing in the record establishing that POHL could have executed the U S. District Court judgment *in Japan*." (Emphasis provided, App. 9). "In Japan" is a non-issue. (R., v.1 at 15-30). The

invalidity of a judgment depends upon the fact that it is "in no manner responsive to the issues tendered in the pleadings." *Reynolds v. Stockton,* 140 U.S. 265 (1890). See also *Windsor v McVeigh,* 93 U S. 283 (1876). Such [sentences] are "mere mockeries, and in no just sense judicial proceedings . . mere arbitrary edicts or substantial frauds." *Id* at 281. "So a departure from established modes of procedure will often render the judgment void " *Id* at 283

In an abundance of caution, without waiving objections, Petitioner submitted the pertinent sections of the Japan Code of Civil Procedure (JCCP) in English, included in the judicial notice (R., v.4 at 320-324) Article 118 (JCCP) provides that Japan enforces a foreign judgment when jurisdiction of the foreign court is admitted by law or treaties, the defeated defendant "received service of summons" excluding service by publication, that the foreign judgment and procedure are "not incompatible with public order or good morals of Japan," that there "exists reciprocal guaranty." (*Id.* R. at 324; App. 39) This was identical to Article 200 (JCCP) in Respondent's bulk of exhibits. (R., v 3 at 278) The Japan Company was served the federal summons by certified mail upon Order of the Federal Court. (R., v.3 at 103-113) It answered the "allegations" of the federal lawsuit in a Japan Court, now called the "Japan lawsuit " (R , v 3 at 123-126). Respondent *admitted* that the Japan Company was served by certified mail. (R , v.3 at 53). Still, Respondent concluded with underscored emphasis that recognition of the federal

judgment is "contrary to public order or good morals in Japan." (R , v3 at 61). Despite the only facts and Japan law on record, the Court below held: " . . there is nothing in the record establishing that POHL could have executed the U.S District Court judgment *in Japan.*" (Emphasis provided, App. 9). It usurped the role of a Japan Court Every exertion of authority of this sort beyond its territorial limits "is a mere nullity . . . and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations " *Galpin v Page,* 85 U.S. 367, WL 16036 (1873). "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government" *Hilton v. Guyot,* supra, at 194

The Court below rendered summary judgment "under Japan law." (App. 9). It could only refer to the Japan law on record Art. 200 (JCCP) of Respondent and Art 118 (JCCP) of Petitioner described above, with identical provision. (App 39). Thus, its decision means: (1) United States has no reciprocity or treaty with Japan who shall not recognize any judgment from this country, and this country shall do the same as to judgments from Japan; (2) The federal judgment is "incompatible" with the kind of "public order or good morals of Japan," and the Japan judgments are likewise incompatible with "public order or good morals" of this country This embarrassment is to all

three branches of the United States and Japan governments This lack of unity, with the State Court's improper legal war with the Federal Courts, announces to the world what foreign countries would like to hear.

This matter cannot wait while litigants, as Respondent, improperly utilize State forums to air their political attitude against this Nation's judgments; while the Court below usurps roles of foreign countries, allies or enemies; while it infringes upon federal proceedings and restrains enforcement of past, present, future federal judgments. It improperly makes it its concern how and where prevailing litigants collect their federal judgments and restricts or forecloses all their opportunity. Access to Federal Courts will be extremely obstructed, even nullified, by decisions like those of the Court below. This moment needs this Court's intercession before more national problems occur because the Hawaii Court below will not change.

CONCLUSION

It is respectfully asked that herein Petition be granted.

Respectfully submitted,

ERLINDA DOMINGUEZ
Petitioner Pro Se

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28140

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINA DOMINGUEZ, Plaintiff-Appellant,

v.

PRICE OKAMOTO HIMENO & LUM, a Law Corporation, Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10, DOE CORPORATIONS 1-10; and DOE PARTNERSHIPS, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT (CIVIL NO. 03-1-2372)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Fujise and Leonard, JJ.)

(Filed Apr. 29, 2009)

Plaintiff-Appellant Erlinda Dominguez, dba Law Offices of Erlinda Dominguez (Dominguez), appeals from the Circuit Court of the First Circuit's (circuit court) September 6, 2006 Judgment in favor of Defendant-Appellee Price Okamoto Himeno & Lum (POHL) [1]

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[1] The Honorable Eden E. Hifo presided

On September 21, 1989, Dominguez filed a complaint on behalf of Junie and Juan Barnedo (collectively the Barnedos) in the United States District Court, District of Hawai'i (U.S. District Court), against Marukiku Menki Company (Marukiku), a Japanese corporation, for injuries sustained by Junie Barnedo while she was operating a noodle making machine manufactured by Marukiku. On August 24, 1993 the U.S. District Court entered a default judgment in favor of the Barnedos and against Marukiku for $483,875.09

On January 22, 1992 the Tokyo District Court entered a default judgment in case no 7825 in favor of Marukiku and against the Barnedos (Japan judgment).[2] The declaratory judgment stated that Marukiku brought the underlying action in order to confirm that it was not liable for the damages Junie Barnedo sustained from injuries caused by the noodle making machine manufactured by Marukiku Judgment was entered in Marukiku's favor because the Barnedos failed to appear for oral argument or answer Marukiku's complaint, despite having been duly summoned.

In February of 1994, Dominguez and POHL entered into a counsel association agreement (counsel agreement) which set forth the terms of a counsel

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[2] Although Dominguez disputes the authenticity of the Japan judgment, we conclude that it was properly authenticated and considered by the circuit court *See* infra section (1)

relationship between Dominguez and POHL. Paragraph 5 of the counsel agreement stated, "[Dominguez] will carry her own professional liability insurance and indemnify POHL for any alleged legal malpractice which occurred prior to the effective date of the agreement." Paragraph 6 of the counsel agreement provided, "POHL will carry its own professional liability insurance and indemnify [Dominguez] for any alleged legal malpractice which occurs after the effective date of the agreement."

On June 3, 1996, Dominguez and POHL dissolved their counsel relationship (1996 termination agreement), but agreed that "[t]he parties will keep their rights and obligations arising from the original agreement that took effect on Feb. 1, 1994[.]"

In July of 1999, the Barnedos filed a complaint against Dominguez alleging that Dominguez's handling of the lawsuit in the U.S. District Court, and her failure to defend the Barnedos in the action filed in Japan by Marukiku constituted malpractice. A jury subsequently found that Dominguez was negligent in serving Marukiku by mail and/or publication, by failing to name a third party defendant in the action in U.S. District Court, and by failing to properly defend against the Japan action. The jury awarded the Barnedos $483,875.09 in total damages. After adding prejudgment interest, the amount awarded to the Barnedos increased to "approximately a million and a half" dollars

On November 28, 2003 Dominguez filed a complaint against POHL alleging, inter alia, that any errors in the handling of the Barnedos' matter were "attributable to the negligence and conduct of [POHL] who was a co-counsel in the handling of the injury claims of the Barnedos and who was also controlling, directing and managing the claims and cases where [Dominguez] was involved. . . ." On February 2, 2004, Dominguez filed a First Amended Complaint (FAC).

In its answer to Dominguez's FAC, POHL asked the circuit court to dismiss Dominguez's action, enter judgment in favor of POHL, award POHL costs and attorneys' fees, and award POHL "other relief." Additionally, POHL filed a counterclaim against Dominguez Count I of POHL's counterclaim alleged that Dominguez breached the counsel agreement because Dominguez failed to carry her own professional liability insurance. Count II alleged abuse of process because Dominguez "[knew] or should have known" that her allegation that POHL was legally obligated to indemnify Dominguez was false. Finally, POHL's counterclaim prayed for judgment in its favor, an award of general, special, and punitive damages, prejudgment interest, costs, and reasonable attorneys' fees, and other relief that the court deemed just.

On November 15, 2005, Dominguez filed a motion for summary judgment as to Count I, breach of

contract, of POHL's counterclaim based upon Hawaii Revised Statutes § 657-1 (MSJ – Count I).[3]

On November 17, 2005, Dominguez filed a motion for summary judgment and/or motion to dismiss in reference to Count II, abuse of process, of POHL's counterclaim based upon no abuse of process and no claim for relief for POHL (MSJ – Count II)

On December 14, 2005, POHL filed a motion for summary judgment as to Dominguez's claim for indemnification and on its counterclaim for breach of contract (POHL MSJ – Count I).

On the same day, POHL also filed its motion for summary judgment as to Dominguez's FAC (POHL MSJ – FAC), asserting that "POHL Is Entitled to Summary Judgment on [Dominguez's] Claim for Indemnification and Tortious Conduct."

On March 1, 2006, the circuit court entered four orders on the motions filed by Dominguez and POHL. The four orders were: (1) an order denying the MSJ – Count I, (2) an order granting the MSJ – Count II, (3) an order granting the POHL MSJ – FAC, and (4) an order granting the POHL MSJ – Count I

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[3] HRS § 657-1(1) (1993) states in pertinent part, "The following actions shall be commenced within six years next after the cause of action accrued, and not after (1) Actions for the recovery of any debt founded upon any contract, obligation, or liability "

Dominguez subsequently filed a number of motions for reconsideration, dismissal, and for attorneys' fees, all of which were denied. POHL moved for, and was granted, a total of $115,932 14 in attorneys fees, general excise tax (GET), and costs.

On September 6, 2006, the circuit court entered judgment as follows: (1) in favor of POHL as to all claims raised in the complaint, the FAC, and in POHL's counterclaim for breach of contract, (2) in favor of Dominguez on POHL's counterclaim for abuse of process,[4] and (3) in favor of POHL and against Dominguez for $115,932 14.

Dominguez asserts the following points of error on appeal:

(1) "The Court erred in admitting arguments and evidence of [POHL] as to Japan law, orders and judgment, overruling [Dominguez's] Objections of [POHL's] failure to plead these affirmative defenses, erred in admitting Japan exhibits that were not properly authenticated and erred in taking 'judicial notice' of Japanese law, erred in the correct application of U.S. and Japan laws."

(2) "The Court erred in ruling that [POHL's] counterclaim as to [Dominguez's] professional insurance is not time-barred by the six years [sic] statute of limitations; the Court provided two vague and inconsistent 'accrual and tolling dates' for [POHL]:

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[4] POHL did not appeal that aspect of the judgment

that [Dominguez's] obligation was 'continuing' that tolled the statute of limitations *and* that [POHL's] only damage claim is its fees and costs 'in this suit' *and* its claim did not accrue until [Dominguez] filed this instant suit."

(3) "The Court erred in adding provisions in the Agreement between the parties by concluding that [Dominguez] was required to purchase professional insurance that had retroactive effect to cover errors that would extend to indefinite number of years in the past and unknown number of years in the future, for limitless risks and policy amounts."

(4) "The Court erred in refusing to dismiss [POHL's] only claim for damages of fees and costs 'in this suit' as [POHL] has no contractual claim on fees and is not allowed by statute."

(5) "The Court erred in refusing to dismiss [POHL's] only damage claim for fees 'in this suit' because it is not a proper claim for a counterclaim as it did not exist when [Dominguez] sued, and was not properly pleaded."

(6) "The Court erred in awarding [POHL's] fees and costs that cannot be allowed under the law, and which were arbitrary, exorbitant, unnecessary and not properly supported[.]"

(7) "The Court erred in disallowing [Dominguez's] fees and costs . . . for defending against [POHL's] counterclaim of 'Abuse of Process' which was frivolous."

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Dominguez's points of error[5] as follows:

(1) The circuit court did not err in its consideration of Japan law or its reliance on certain exhibits related to the Japan action, and did not further err in granting POHL summary judgment as to Dominguez's FAC.

POHL was not required to plead Japan law and/or the Japan action as an affirmative defense, since those matters were used to negate the causation element of Dominguez's claims against POHL. *Bhakta v. County of Maui*, 109 Hawai'i 198, 212, 124 P.3d 943, 957 (2005).

The circuit court did not abuse its discretion in taking judicial notice of Japan law pursuant to Hawai'i Rules of Evidence (HRE) Rule 202 and Hawai'i Rules of Civil Procedure (HRCP) Rule 44.1. *See State v. West*, 95 Hawai'i 452, 456-57, 24 P.3d 648, 652-53 (2001) (stating "the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a 'judgment call' on the part of the trial court")

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[5] Any other arguments raised by Dominguez that are not specifically addressed herein are without merit.

The circuit court properly considered the Japan judgment, since that judgment was admissible pursuant to HRE Rule 902(3). Although the letter dated February 19, 1991, from David Kuwahara to the court clerk in Japan acknowledging receipt of the Marukiku complaint against the Barnedos in case no. 7825, was not properly authenticated under the HRCP 56(e), there was no dispute as to its content, and it may be considered since it was offered by both Dominguez and POHL *Takaki v Allied Machinery Corp*, 87 Hawai'i 57, 69, 951 P2d 507, 519 (App. 1998) (court considered exhibit attached to movants' memorandum in support of summary judgment motion where exhibit was referred to in nonmovant's affidavit and attached to his opposition memorandum)

To the extent that Dominguez disputed the authenticity of other documents relating to the Japan action, those other documents were not essential to the circuit court's ruling. Thus, even assuming arguendo that they were not admissible, any error was harmless *See* HRCP Rule 61.

Based on the undisputed, admissible facts, POHL was entitled to summary judgment as a matter of law Dominguez failed to raise a material question of fact as to whether POHL caused the damages claimed by Dominguez. In light of the Japan judgment and its effect under Japan law, there is nothing in the record establishing that POHL could have executed the U.S. District Court judgment in Japan. "A party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is [the

party] entitled to a trial on the basis of a hope that [the party] can produce some evidence at that time." *Henderson v. Prof'l Coatings Corp.*, 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (internal quotation marks and citation omitted). Thus, Dominguez's assertion that there was an issue of a material fact regarding the enforcement of the U.S District Court's judgment "because no one tried to enforce it" is insufficient.

Accordingly, the circuit court did not err by considering the Japan judgment, by applying Japanese law, and by granting the POHL MSJ – FAC.

(2) The circuit court did not err by denying Dominguez's MSJ – Count I. To the extent that Dominguez was obligated to carry professional liability insurance under the counsel agreement, *see* section (3) below, that obligation was a continuing one and POHL's counterclaim for breach of contract was not barred by the statute of limitations.

As a general rule the time limit to institute an action based upon a claim for breach of contract begins when the contract is breached. *Au v Au*, 63 Haw. 210, 219, 626 P2d 173, 180 (1981). However, "where a duty imposed prior to a limitations period is a continuing one, the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period[.]" *Condo Units, LP v New York State Div. of Housing and Community Renewal*, 4 A.D.3d 424, 425 (N Y. App. Div. 2004). Furthermore, "where a contract provides for continuing performance over a period of time, each breach

may begin the running of the statute anew such that accrual occurs continuously" *Stalis v Sugar Creek Stores, Inc*, 295 A.D.2d 939, 940-41 (N.Y. App. Div. 2002) Thus, for the purposes of the statute of limitations, the effect of a continuing obligation in a contract is that the "cause of action accrued anew every day for each continuation of the wrong." *Id.* at 941 (citation, internal quotation marks, and bracket omitted); *see also Guilbert v. Gardner*, 480 F.3d 140, 149-150 (2nd Cir. 2007); *Ballin v. Ballin*, 204 A.D.2d 1078, 1079 (N Y. App Div. 1994).

Applying these principles here, any obligation by Dominguez to carry professional liability insurance under the counsel agreement was a continuing one, and her failure to do so constituted a continual breach. Thus, the circuit court did not err in finding that POHL's counterclaim was not time-barred.

(3) The circuit court erred in granting the POHL MSJ – Count I, since there was a genuine issue of material fact regarding whether Dominguez was required by the counsel agreement to carry professional liability insurance. *Crichfield v. Grand Wailea Co*, 93 Hawai'i 477, 482-83, 6 P.3d 349, 354-55 (2000) ("A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.").

Dominguez submitted a declaration in the circuit court asserting that "shortly after" the counsel agreement was executed in 1994, POHL orally waived the

requirement, in paragraph 5 of the counsel agreement, that Dominguez maintain professional liability insurance. The circuit court assumed that assertion to be true for the purposes of summary judgment, but nevertheless concluded that the insurance requirement was reinstated by the 1996 termination agreement However, we respectfully disagree with the circuit court, and conclude that there is a question of material fact as to whether the 1996 termination agreement reinstated the insurance requirement as set forth in paragraph 5 of the counsel agreement. Accordingly, the circuit court erred in granting the POHL MSJ – Count I

(4) The circuit court did not err in awarding POHL its attorneys' fees, GET, and costs on the FAC. The FAC was an action "in the nature of assumpsit," and POHL was the prevailing party and accordingly was entitled to its attorneys' fees, GET, and costs relating to its defense against Dominguez's FAC under HRS § 607-14 (Supp. 2007)[6]. *See Kamaka v. Goodsill Anderson Quinn & Stifel,* 117 Hawai'i 92,

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[6] HRS § 607-14 (Supp 2008) states in pertinent part

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that this amount shall not exceed twenty-five per cent of the judgment

121, 176 P.3d 91, 120 (2008); *Blair v. Ing*, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001)

Because the "essential character" of the FAC was in the nature of assumpsit, *Blair*, 96 Hawai'i at 332, 31 P.3d at 189, and POHL was the prevailing party, the circuit court was not required to find that Dominguez's claims were frivolous in order to award POHL attorneys' fees under HRS § 607-14.

However, the circuit court erred in awarding POHL attorneys' fees, GET, and costs as damages on their breach of contract counterclaim. Since we have concluded that summary judgment should not have been granted with respect to whether Dominguez breached the counsel agreement by failing to have professional liability insurance, *see* section (3) above, it was premature for the circuit court to award POHL damages based on that claim Moreover, the damages awarded by the circuit court were not properly recoverable in a breach of contract action.[7] In Hawai'i, "the accepted rule on attorneys' fees is that ordinarily they cannot be awarded as damages or costs unless so provided by statute, stipulation or agreement." *Uyemura v Wick*, 57 Haw. 102, 108, 551 P.2d 171, 176

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[7] Dominguez preserved this issue in the circuit court *See* Dominguez's opposition to POHL's motion for attorneys' fees and costs filed on April 28, 2006 at page 8-11 She advanced sufficient argument on this issue to raise it for consideration on appeal, *see* amended opening brief at 31-32 In any event, this court may address plain error Hawaii Rules of Appellate Procedure (HRAP) Rule 28(b)(4)

(1976); *Western Sunview Properties, LLC v. Federman*, 338 F Supp. 2d 1106, 1127-28 (D. Haw. 2004). The counsel agreement did not provide for recovery of attorneys' fees or costs in the event of a dispute under the agreement, and there is no evidence in the record of an agreement or stipulation for their payment. Nor is there a statute that provides that attorneys' fees and costs incurred in defending a breach of contract action can be recovered as damages on a counterclaim brought alleging a breach of the same contract. Indeed, allowing such recovery would be contrary to HRS § 607-14, since a party could recover the full amount of their attorneys' fees and costs as damages without regard to the limits set forth in HRS § 607-14.

In the August 15, 2006 order, the circuit court awarded POHL attorneys' fees, GET, and costs in the total amount of $115,932.14, both as the prevailing party on the FAC, and for damages on the breach of contract counterclaim. In awarding that amount to POHL, the court did not differentiate between fees and costs that related to the defense of the FAC, and those that related to the prosecution of the breach of contract counterclaim. Because we have concluded that the circuit court erred in granting the POHL MSJ – Count I, we vacate the award of attorneys' fees, GET, and costs and remand to the circuit court to allow the court to eliminate, if practicable, any of the requested fees, costs, and GET that related to POHL's prosecution of the breach of contract counterclaim. *Cf Blair*, 96 Hawai'i at 332, 31 P.3d at 189

(noting that "in awarding attorneys' fees in a case involving both assumpsit and non-assumpsit claims, a court must base its award of fees, if practicable, on an apportionment of the fees claimed between assumpsit and non-assumpsit claims") (emphasis omitted).

(5) The circuit court did not err in denying Dominguez's motion to dismiss POHL's breach of contract counterclaim. Although it is not clear exactly what Dominguez is arguing on appeal, it appears that Dominguez contests the circuit court's July 5, 2006 order denying her motion to dismiss POHL's breach of contract counterclaim on the basis that it was a permissive rather than compulsory counterclaim.[8] However, even assuming arguendo that it was a permissive counterclaim under HRCP Rule 13, nevertheless it was appropriately brought in this action.

The fact that POHL's claimed attorneys' fees and costs were not determined at the time of the filing of the counterclaim is not itself a basis for dismissing the counterclaim, because POHL could claim at least

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[8] Although Dominguez entitled her motion as a "motion to dismiss," because it was filed on May 17, 2006, after her May 4, 2005 answer to POHL's counterclaim, and it includes documents outside of the pleadings, it should be reviewed as a motion for summary judgment *See* HRCP Rule 12(b), *Stevens v Kirkpatrick*, 82 Hawai'i 91, 93, 919 P2d 1003, 1005 (App 1996) (stating "because the circuit court considered outside matters in rendering its ruling, we review the court's Order of Dismissal as one granting summary judgment pursuant to HRCP Rule 56 and not a motion to dismiss pursuant to HRCP Rule 12(b)(6)")

nominal damages relating to Dominguez's alleged breach of the counsel agreement at the time it filed its counterclaim. *See Ferreira v Honolulu Star-Bulletin, Ltd*, 44 Haw 567, 577, 356 P.2d 651, 657 (1960); *Sunny Baer Co., Inc. v. Slaten*, 623 S W.2d 595, 598 (Mo. Ct. App 1981) ("In contract cases, proof of the contract and of its breach gives rise to nominal damages and, thus, a submissible case is made regardless of the failure to prove actual damages.")

Accordingly, the circuit court did not err in denying Dominguez's motion to dismiss.

(6) Subject to any reduction on remand for attorneys' fees and costs associated with the prosecution of the breach of contract counterclaim, the circuit court did not err in awarding POHL's attorneys' fees and costs on the FAC because POHL's motion for attorneys' fees and costs was properly supported, and the record reflects that the fees were not unreasonable. *Kamaka*, 117 Hawai'i at 123, 176 P 3d at 122.

POHL's motion was supported by documents which provided an adequate basis for determining the reasonableness of the requested attorneys' fees, including 54 pages of billing invoices which provided detailed explanations of each fee item being requested, a table of fees and costs which provided a summary of all fees and costs, and an affidavit by one of POHL's attorneys, Kenneth Mansfield, which established the basis for the billing rates.

Furthermore, under the circumstances of this case the fees requested by POHL were reasonable.

POHL was required to address novel issues relating to the proceedings in Japan, had to answer numerous motions and other filings, POHL's attorneys charged a rate that was lower than is customary for their services, and the damages prayed for by Dominguez were well over a million dollars. *See Booker v Midpac Lumber Co , Ltd ,* 65 Haw. 166, 170 n.2, 649 P.2d 376, 379 n.2 (1982) (listing factors used to evaluate the reasonableness of attorneys' fees).

Dominguez's argument that the costs and fees were not properly supported by invoices is without merit. The record shows that POHL submitted both redacted and unredacted invoices which provide detailed billing times, amounts, the name of the attorney who was billing the time, his or her rate, and the work for which they were billing.

Finally, Dominguez asserts that POHL had excess fees and costs, yet fails to show where in the record these complained of expenses were, nor does Dominguez provide any citation to the part of the record where POHL's alleged "excessive preparation time of paralegal, duplicative efforts by the attorney and paralegal, and performance of clerical functions" can be found. Thus, these arguments are deemed waived. HRAP Rule 28(b)(7).

Accordingly, the circuit court did not abuse its discretion in awarding POHL attorneys' fees, GET, and costs on the FAC, subject to any reduction on remand for expenses associated with the prosecution of the breach of contract counterclaim.

(7) The circuit court did not err in denying Dominguez's motion for attorneys' fees and costs because POHL's abuse of process counterclaim was not frivolous HRS § 607-14 5 (Supp. 2008).

Preliminarily we note that Dominguez does not provide a discernable argument as to why POHL's abuse of process claim was frivolous Accordingly, this argument is deemed waived. HRAP Rule 28(b)(7); *International Sav. and Loan Ass'n, Ltd v. Carbonel,* 93 Hawai'i 464, 473, 5 P3d 454, 463 (App. 2000). However, even assuming Dominguez did not waive this issue, Dominguez's argument is without merit.

In *Kawaihae v. Hawaiian Ins. Companies,* 1 Haw. App. 355, 361, 619 P.2d 1086, 1091 (1980), this court defined a frivolous claim as "manifestly and palpably without merit, so as to indicate bad faith on [the pleader's] part such that argument to the court was not required."

The record establishes that prior to filing the lawsuit against POHL, Dominguez wrote a letter to POHL dated December 10, 2001 in which Dominguez stated in part, "I take full responsibility for my past decisions in the case which cemented the results way before you came into the picture." In view of that letter, the circuit court did not err in concluding that POHL's claim for abuse of process was not manifestly and palpably without merit. Accordingly, the circuit court did not abuse its discretion in denying Dominguez's attorneys' fees motion. *See Kamaka,* 117 Hawai'i at 105, 176 P.3d at 104 ("The trial court's grant or denial

of attorneys' fees and costs is reviewed under the abuse of discretion standard.") (citation and bracket omitted).

Therefore,

IT IS HEREBY ORDERED that we affirm the September 6, 2006 Judgment entered in the Circuit Court of the First Circuit in favor of POHL as to the complaint and FAC, and in favor of Dominguez with regard to POHL's counterclaim for abuse of process.

IT IS FURTHER ORDERED that we vacate the Judgment with regard to POHL's counterclaim for breach of contract, and we vacate the award of $115,932 14 in favor of POHL and against Dominguez and remand for further proceedings consistent with this order.

DATED: Honolulu, Hawai'i April 29, 2009.

On the briefs

Erlinda Dominguez
for Plaintiff-Appellant.

William C. McCorriston,
McCorriston Miller Mukai
MacKinnon,
for Defendant-Appellee.

/s/ Mark Recktenwald
Chief Judge

/s/ Alexa D. M. Fujise
Associate Judge

/s/ J.J. Leonard
Associate Judge

McCORRISTON MILLER MUKAI MacKINNON LLP

WILLIAM C. McCORRISTON # 995-0
KENNETH J. MANSFIELD #7227-0
BECKY T. CHESTNUT #7756-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Telephone No. (808) 529-7300

Attorneys for Defendant
PRICE OKAMOTO HIMENO & LUM

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA DOMINGUEZ,	) CIVIL NO. 03-1-2372-11 (EEH) (Breach of Contract/ Indemnification)
Plaintiff,	)
vs.	) ORDER GRANTING DEFENDANT PRICE OKAMOTO HIMENO & LUM'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S FIRST AMENDED COMPLAINT (FILED ON 12/14/05)
PRICE OKAMOTO HIMENO & LUM, a Law corporation, JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; and DOE PARTNERSHIPS,	) (Filed Mar. 1, 2006)
Defendants.	) Hearing: Date. January 19, 2006 Time: 3:30 p.m Judge: Honorable Eden E. Hifo
	) Trial Date: April 17, 2006

ORDER GRANTING DEFENDANT PRICE OKAMOTO HIMENO & LUM'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S FIRST AMENDED COMPLAINT (FILED ON 12/14/05)

Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's First Amended Complaint, filed December 14, 2005 ("Motion"), came on for hearing before the Honorable Eden E. Hifo on January 19, 2006 at 1:30 p m William C. McCorriston, Kenneth J Mansfield and Becky T. Chestnut appeared on behalf of Defendant Price Okamoto Himeno Lum. Plaintiff Erlinda Dominguez, doing business as Law Offices of Erlinda Dominguez, appeared *pro se*.

The Court, having considered the memoranda, files and pleadings herein, and having heard the arguments of counsel, and being fully apprised in the premises, and good cause appearing therefore, orders as follows:

1. Pursuant to Rule 202(c)(5) of the Hawaii Rules of Evidence, the Court takes optional judicial notice of the law of Japan

2. Pursuant to Rule 902(3) of the Hawaii Rules of Evidence, the Court finds the documents regarding the Japan judgment are authenticated and properly in evidence, and overrules Plaintiff's objections to the exhibits related to the Japan court action.

3. With regard to Plaintiff's objection that the Court's consideration of the law of Japan is

improper because Defendants did not assert it as an affirmative defense, the Court overrules the objection, as Japan law is relevant to Defendants' denial of causation, pursuant to Rule 8(b) of the Hawaii Rules of Civil Procedure, and is not an affirmative defense as set out in 8(c) of the Hawaii Rules of Civil Procedure.

4. Both parties offered the February 19, 1991 letters from Mr. David Kuwahara to the court clerk in Japan and to the presiding judge in the Japan case. The letters constitute an admission of authenticity by the movant and, since they are also attached to the opposition, there is no question as to their authenticity or to the authenticity of any exhibits submitted by both parties. The Court accepts as properly authenticated all exhibits to which no explicit objection was made.

5. To survive summary judgment, Plaintiff must establish a material question of fact. Here, there is no genuine question of material fact as to the Japan judgment. There is also no evidence that anyone could enforce in Japan the subsequently entered U. S. default judgment. Accordingly, even considering the evidence of Price Okamoto Himeno & Lum's involvement in the light most favorable to Plaintiff, there is, no proof of causation The Japan judgment is utterly preclusive of Plaintiff's claims.

6. The Court finds as a matter of law, as movants have said, there is no evidence of legal causation. Therefore, the Motion is granted.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's First Amended Complaint, filed December 14, 2005 is GRANTED.

DATED. Honolulu, Hawaii, FEB 26 2006

EDEN ELIZABETH HIFO
HONORABLE EDEN E HIFO
Judge of the Above-Entitled Court

[SEAL]

APPROVED AS TO FORM

ERLINDA DOMINGUEZ
Pro Se

McCORRISTON MILLER MUKAI MacKINNON LLP

WILLIAM C McCORRISTON # 995-0
KENNETH J. MANSFIELD #7227-0
BECKY T CHESTNUT #7756-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Telephone No. (808) 529-7300

Attorneys for Defendant
PRICE OKAMOTO HIMENO & LUM

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA DOMINGUEZ, Plaintiff, vs. PRICE OKAMOTO HIMENO & LUM, a Law corporation, JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; and DOE PARTNERSHIPS, Defendants.	CIVIL NO. 03-1-2372-11 (EEH) (Breach of Contract/ Indemnification) JUDGMENT (Filed Sep 6, 2006)

JUDGMENT

On March 1, 2006, this Court entered an Order Granting Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's Claim for Indemnification an on its Counterclaim for Breach of Contract (Filed on 12/14/05).

On March 1, 2006, this Court entered an Order Granting Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's First Amended Complaint (Filed on 12/14/05).

On March 1, 2006, this Court entered an Order Granting Plaintiff Erlinda Dominguez dba Law Offices of Erlinda Dominguez's Motion for Summary Judgment and/or Motion to Dismiss in Reference to Count II [Abuse of Process] of Defendant Price Okamoto Himeno & Lum's Counter-Claim Based Upon a No Abuse of Process and No Claim for Relief for Defendant (Filed on 11/17/05).

On August 15, 2006, this Court entered an Order Granting Defendant/Counterclaim Plaintiff Price Okamoto Himeno and Lum's Motion For Attorneys' Fees And Costs (Filed On April 21, 2006) in the amount of $101,671.00 in attorneys' fees, $4,229.51 in general excise tax and $10,031.63 in costs.

Pursuant to Rule 58 of the Hawaii Rules of Civil Procedure, and there being no remaining claims or parties in this action and no just reason for delay:

IT IS ORDERED AND ADJUDGED that final judgment is entered in favor of Price Okamoto

Himeno and Lum as to any and all claims raised in the Complaint and First Amended Complaint.

IT IS FURTHER ORDERED AND ADJUDGED that final judgment is entered in favor of Price Okamoto Himeno and Lum on its Counterclaim for Breach of Contract.

IT IS FURTHER ORDERED AND ADJUDGED that final judgment is entered in favor of Plaintiff Erlinda Dominguez dba Law Offices of Erlinda Dominguez as to Price Okamoto Himeno and Lum's Counterclaim for Abuse of Process.

IT IS FURTHER ORDERED AND ADJUDGED that final judgment is entered in favor of Price Okamoto Himeno and Lum and against Erlinda Dominguez dba Law Offices of Erlinda Dominguez in the following amount:

Attorneys' fees	$101,671.00
General excise tax	$4,229.51
Costs	$10,031.63
Total	**$115,932.14**

DATED: Honolulu, Hawaii, SEP 05 2006

EDEN ELIZABETH HIFO
HONORABLE EDEN E. HIFO
Judge of the Above-Entitled Court

[SEAL]

APPROVED AS TO FORM

_____

ERLINDA DOMINGUEZ
Pro Se

McCORRISTON MILLER MUKAI MacKINNON LLP

WILLIAM C. McCORRISTON # 995-0
KENNETH J. MANSFIELD #7227-0
BECKY T. CHESTNUT #7756-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Telephone No (808) 529-7300

Attorneys for Defendant
PRICE OKAMOTO HIMENO & LUM

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA DOMINGUEZ, Plaintiff, vs. PRICE OKAMOTO HIMENO & LUM, a Law corporation, JOHN DOES 1-10, JANE DOES 1-10; DOE CORPORATIONS 1-10; and DOE PARTNERSHIPS, Defendants	CIVIL NO. 03-1-2372-11 (EEH) (Breach of Contract/ Indemnification) ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT PRICE OKAMOTO HIMENO & LUM'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S FIRST AMENDED COMPLAINT (FILED MARCH 1, 2006) (FILED ON MARCH 6, 2006) **[NON-HEARING MOTION]** (Filed Apr. 25, 2006)

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT PRICE OKAMOTO HIMENO & LUM'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S FIRST AMENDED COMPLAINT (FILED MARCH 1, 2006) (FILED ON MARCH 6, 2006)

Plaintiff Erlinda Dominguez dba Law Offices of Erlinda Dominguez filed her Motion for Reconsideration of Order Granting Defendant Price Okamoto Himeno & Lum's Motion for Summary Judgment as to Plaintiff's First Amended Complaint (filed March 1, 2006) on March 6, 2006 ("Motion"). The Motion was a non-hearing motion.

The Court, having reviewed the subject Motion and being duly advised of the record and file herein, and good cause appearing therefore, hereby denies the Motion of Plaintiff Erlinda Dominguez dba Law Offices of Erlinda Dominguez.

DATED: Honolulu, Hawaii, APR 25 2006

/s/ Eden Elizabeth Hifo
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

ERLINDA DOMINGUEZ
Pro Se

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28140

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA DOMINGUEZ, Plaintiff-Appellant,

v.

PRICE OKAMOTO HIMENO & LUM, a Law Corporation, Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; and DOE PARTNERSHIPS, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT (CIVIL NO 03-1-2372)

ORDER DENYING MOTION FOR RECONSIDERATION

(By. Fujise, Presiding Judge, and Leonard, J.[1])

(Filed Jun. 1, 2009)

Upon consideration of "Plaintiff-Appellant's Motion for Reconsideration of Portions of the Summary Disposition Order" filed on May 8, 2009 and "Plaintiff-Appellant's Declaration of Good Faith" filed on May

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[1] Former Chief Judge Mark E Recktenwald was a member of the panel on this appeal, but is now an Associate Justice of the Hawai'i Supreme Court, effective May 11, 2009

12, 2009, the papers in support and the record and files herein,

IT IS HEREBY ORDERED that said motion is denied.

DATED. Honolulu, Hawai'i, June 1, 2009.

On the motion:

Erlinda Dominguez
for Plaintiff-Appellant.

/s/ Alexa D. M. Fujise
Presiding Judge

/s/ J.J Leonard
Associate Judge

NO 28140

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA DOMINGUEZ, Plaintiff-Appellant,

v.

PRICE OKAMOTO HIMENO & LUM, a Law Corporation, Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10, and DOE PARTNERSHIPS, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT (CIVIL NO 03-1-2372)

JUDGMENT ON APPEAL

(By: Fujise, Presiding Judge, for the court[1])

(Filed Jun. 5, 2009)

Pursuant to the Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawai'i entered on April 29, 2009, the September 6, 2006 Judgment entered in the Circuit Court of the First Circuit in favor of Defendant-Appellee, Price Okamoto Himeno & Lum, as to the complaint and first amended complaint, and in favor of Plaintiff-Appellant,

---

[1] Fujise, Presiding Judge, and Leonard, J The third member of the merit panel, former Chief Judge, Mark E Recktenwald, was sworn in as an Associate Justice of the Hawai'i Supreme Court on May 11, 2009

Dominguez, with regard to Price Okamoto Himeno & Lum's counterclaim for abuse of process is affirmed. The Judgment with regard to Price Okamoto Himeno & Lum's counterclaim for breach of contract is vacated, and the award of $115,932 14 in favor of Price Okamoto Himeno & Lum and against Dominguez is vacated, and this case is remanded for proceedings consistent with the opinion.

DATED: Honolulu, Hawai'i, June 5, 2009.

FOR THE COURT:

/s/ Alexa D. M. Fujise
Presiding Judge

[SEAL]

NO. 28140

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

ERLINDA DOMINGUEZ,
dba LAW OFFICES OF ERLINDA DOMINGUEZ,

Petitioner/Plaintiff-Appellant,

vs.

PRICE OKAMOTO HIMENO & LUM
a Law Corporation,

Respondent/Defendant-Appellee.

CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
(CIV. NO. 03-1-2372)

ORDER REJECTING APPLICATION
FOR WRIT OF CERTIORARI
(By: Duffy, J., for the court[1])

(Filed Sep. 1, 2009)

Petitioner/Plaintiff-Appellant's application for writ of certiorari, filed on July 22, 2009, is hereby rejected.

DATED: Honolulu, Hawai'i, September 1, 2009.

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[1] Considered by Moon, C.J., Nakayama and Duffy, JJ., Circuit Judge Chan, in place of Acoba, J., recused, and Circuit Judge Crandall, in place of Recktenwald, J., recused

FOR THE COURT:

/s/ James E Duffy, Jr. [SEAL]
Associate Justice

Erlinda Dominguez,
petitioner/plaintiff-
appellant, *pro se*,
on the application

William C McCorriston,
Kenneth J Mansfield
and R. John Seibert
(of McCorriston Miller
Mukai MacKinnon LLP)
for respondent/defendant-
appellee in opposition

U.S. CONST., ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to bear witness against himself, nor be deprived of life, liberty, or property without due process of law nor shall private property be taken for public use, without just compensation.

* * *

U.S. CONST., ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

---

28 U.S.C. § 1741. Foreign official documents

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure.

FRCP, Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

> **(3) Foreign public documents.** A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul vice, consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the

court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

JAPAN CODE OF CIVIL PROCEDURE

Article 108. The service to be effected in a foreign country shall be made upon entrustment by the presiding judge to the competent government authorities of that country or to the Japanese ambassador, minister, or consul stationed in that country.

(Report on service)

Article 109. The official who has effected the service shall draw up a document, enter therein the matters relating to the service, and submit it to the court.

Article 118 A final and conclusive judgment by a foreign court shall be valid only upon the fulfillment of the following conditions.

(1) The jurisdiction of the foreign court is admitted by laws and ordinances, or a treaties;

(2) The defeated defendant who has received service of summons or orders (excluding service by publication or other similar service) necessary to commerce procedures, or who has responded to the action without receiving such service,

(3) The contents of a judgment and the procedure is not incompatible with public order or good morals of Japan;

(4) There exists reciprocal guaranty.

ERLINDA DOMINGUEZ 2567
1804 Ala Moana Blvd., #17-A
Honolulu, Hawaii 96815
Telephone. 531-8457

Attorney for Plaintiff

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAII

ERLINDA DOMINGUEZ, dba LAW OFFICES OF ERLINDA DOMINGUEZ,	) CIVIL NO. 03-1-2372-11 EEH
Plaintiff,	) (Breach of Contract/ Indemnification)
vs.	) PLAINTIFF'S OBJECTIONS TO DEFENDANT PRICE OKAMOTO HIMENO & LUM'S ISSUES OF ANY JAPAN LAW, ORDER, JUDGMENT, and U S. DIVERSITY JURISDICTION, AS THESE DEFENSES WERE NOT AFFIRMATIVELY RAISED IN ITS ANSWER TO COMPLAINT [defendant filed on Mar. 10, 2004]; DECLARATION OF PLAINTIFF; EXHS. A-C; CERTIFICATE OF SERVICE
PRICE OKAMOTO HIMENO & LUM, a Law Corporation, et al.	
Defendants.	

) Hearing Information:
)
) DATE: Jan. 19, 2006
) TIME: 3:30 p.m
) JUDGE: Hon Eden
) Elizabeth Hifo
)

PLAINTIFF'S OBJECTIONS TO DEFENDANT PRICE OKAMOTO HIMENO & LUM'S ISSUES OF ANY JAPAN LAW, ORDER, JUDGMENT and U.S. DIVERSITY JURISDICTION, AS THESE DEFENSES WERE NOT RAISED IN ITS ANSWER TO COMPLAINT [defendant filed on Mar. 10, 2004)

COMES NOW Plaintiff, Erlinda Dominguez, dba Law Offices of Erlinda Dominguez, and respectfully objects to the issues or defenses raised by Defendant in its Motions to be heard on Jan. 19, 2006, as they may relate to any Japan Law, Japan Order, Japan Judgment and the Federal Diversity Jurisdiction (or lack thereof) in the underlying product liability case of *Barnedo v Marukiku Menki, Ltd., a Japan Corporation, et al., Civil No. 89-00730*, U.S. District Court for the State of Hawaii, because Defendant failed to plead these defenses properly and affirmatively in its responsive pleadings.

The objections are done pursuant to the Chapter 111, Rules on Pleadings and Procedure, Hawaii Civil Procedure, and particularly based on Rule 8(c), Rule 9(d) and (e), of said rules and are based on files and records in this case, including the herein Declaration of Plaintiff and its exhibits. Exh. A is the First Amended Complaint which Defendant responded to

calling its document Answer to Complaint [instead of "Amended] but it undisputedly refers to the First Amended Complaint. Exh B is Defendant's Answer w/ Counterclaim and Exh. C is Plaintiff's Responses to the first Request for Admissions. The attachments such as certificates of service and summons are not attached for brevity. *See Declaration of Plaintiff.*

The filing of this document in no way limits Plaintiff's arguments in her forthcoming written Oppositions to said Defendant's Motions that will be filed in due course and to preserve without a doubt that Plaintiff is not waiving the insufficiency of the pleadings of said Defendant.

DATED: Honolulu, Hawaii, this 22nd day of Dec. 2005.

/s/ Erlinda Dominguez
ERLINDA DOMINGUEZ
Counsel "Pro Se" for
Plaintiff DOMINGUEZ

(2)

No. 09-632

Supreme Court, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ERLINDA DOMINGUEZ,

Petitioner,

v.

PRICE OKAMOTO HIMENO & LUM,
A Law Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of The State Of Hawai'i

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH J. MANSFIELD
Counsel of Record
R. JOHN SEIBERT
JORDON J. KIMURA
McCORRISTON MILLER MUKAI
MacKINNON LLP
P.O. Box 2800
Honolulu, HI 96803-2800
(808) 529-7300

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. section 1257(a) to review this matter where Hawai'i's Intermediate Court of Appeals ("ICA") neither ruled on nor otherwise discussed any federal questions and Petitioner presented none to that court in her assignments of error.

2. Whether the ICA correctly held that the trial court properly considered (1) foreign pleadings and a foreign judgment filed in a Japanese legal proceeding and (2) related Japanese law under Hawai'i's rules of evidence.

3. Whether the ICA correctly held that the trial court did not err in holding that the foreign pleadings and law negated a key causation element of Petitioner's claim against Respondent under Hawai'i law.

LIST OF PARTIES

The parties below were:

1. Erlinda Dominguez, dba Law Offices Of Erlinda Dominguez (Plaintiff below and now Petitioner) (hereinafter "Dominguez")

2. Price Okamoto Himeno & Lum, A Law Corporation (Defendant below and now Respondent) (hereinafter "POHL")

POHL lacks knowledge as to Dominguez's assertions that the "dba" portion of Erlinda Dominguez, dba Law Offices Of Erlinda Dominguez is now defunct and non-existent.

STATEMENT PURSUANT TO RULE 29.6

There are no parent companies to POHL's corporation or any publicly held company owning ten percent or more of POHL's stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
STATEMENT PURSUANT TO RULE 29.6	ii
COUNTERSTATEMENT OF JURISDICTION	1
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	8
I. THE COURT LACKS JURISDICTION OVER THE PETITIONED MATTER	8
A. Dominguez Did Not Properly Present Any Federal Question	8
B. Dominguez's Questions Raise Only State Law Matters	11
II. THE STATE INTERMEDIATE APPELLATE COURT DID NOT ERR IN APPLYING HAWAI'I LAW	12
A. The Tokyo District Court Pleadings Were Properly Admitted	13
B. The Trial Court Properly Took Notice Of Japanese Law	14
C. The *Res Judicata* Argument Was Properly Rejected	15
CONCLUSION	17

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

Article 366, Japan Code of Civil Procedure.....App. 1

Rule 902(3), Hawai'i Rules of Evidence.....App. 1

Rule 202, Hawai'i Rules of Evidence .....App. 2

Rule 44.1, Hawai'i Rules of Civil Procedure.....App. 3

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 10

Bhakta v. County of Maui, 109 Hawai'i 198, 124 P.3d 943 (2005) 16

Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029 (2008) 12

Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai'i 159, 172 P.3d 471 (2007) 9

LinkCo, Inc. v. Nichimen Corp., 164 F. Supp. 2d 203 (D. Mass. 2001) 4

Live Oak Ass'n v. R.R. Comm'n State of Cal., 269 U.S. 354 (1926) 11

Roxas v. Marcos, 89 Hawai'i 91, 969 P.2d 1209 (1999) 15

STATUTE AND RULES

28 U.S.C. § 1257(a) ..... *passim*

Haw. R. App. P. 28(b)(4) 9

Haw. R. Civ. P. 44.1 15

Haw R. Evid. 202(c)(5) 15

Japan Code of Civil Procedure, Art. 366 (1992 ed.) 3

OTHER AUTHORITIES

Eugene Gressman et al., *Supreme Court Practice* § 3.16, at 180 (9th ed. 2007) 10

COUNTERSTATEMENT OF JURISDICTION

Dominguez attempts to invoke this Court's jurisdiction under 28 U.S.C. section 1257 on the basis of alleged violations of federal constitutional law. POHL disagrees. For reasons more fully noted in the Argument, *infra*, Dominguez did not specifically set up or claim any such violations below. Hence, jurisdiction is not properly invoked.

COUNTERSTATEMENT OF THE CASE

This petition raises purely state law issues. POHL is not aware of any conflicts with other state or federal published rulings.

1. Background

Dominguez is a Hawai'i attorney who seeks review of state law evidentiary and pleading rulings by Hawai'i's Intermediate Court of Appeals that she contends violated her Fifth and Fourteenth Amendment due process rights in litigation fallout from a malpractice judgment entered against her. She raised no constitutional arguments before the Intermediate Court of Appeals, and it decided none. The Hawai'i Supreme Court denied her request to review the intermediate appellate court ruling.

POHL is a Honolulu law firm that associated its law practice with Dominguez's following Dominguez's underlying conduct giving rise to a malpractice action

against her. Dominguez subsequently sued POHL for indemnification of the malpractice award, claiming POHL should have timely corrected her misfeasance. Hawai'i's state trial court disagreed and entered summary judgment for POHL, and that ruling was affirmed on appeal.

2. Underlying Dispute

In 1989, Dominguez filed a complaint on behalf of non-party clients in the United States District Court for the District of Hawai'i ("federal district court") against a Japanese corporation for injuries its noodle making machinery allegedly caused. (Pet'r. App. 2.)[1] The foreign corporation did not appear, resulting in entry of an order of default. Thereafter, but before entry of final judgment by the federal district court, the Japanese corporation initiated a preemptive declaratory judgment action against Dominguez's clients in a Tokyo court for the purpose of establishing its non-liability for their injuries. Dominguez was aware of the suit but took no steps to secure representation for her clients. (Pet'r. App. 2.) As a result, in January, 1992, the Tokyo court entered a default declaratory judgment absolving the Japanese company of liability. (Pet'r. App. 2, 9.) Neither Dominguez nor her clients took steps to appeal the foreign judgment, for which time to appeal expired in

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[1] "Pet'r. App." refers to Petitioner Dominguez's Appendix.

1992.[2] In August, 1993, the federal district court entered default judgment against the Japanese corporation. (Pet'r. App. 2.) The Japanese corporation had no known assets outside of Japan.

In February, 1994, two years after the Tokyo judgment was entered and long after the time to appeal it had run, Dominguez and POHL entered into a counsel association agreement, which set forth terms of a counsel relationship between them. (Pet'r. App. 2-3.)[3] The agreement was dissolved two years later in 1996. (Pet'r. App. 3.)

In 1999, Dominguez's clients filed a malpractice action against her for her handling of their personal injury suit in the federal district court and her failure to defend them in the Tokyo action. (Pet'r. App. 3.) A jury awarded judgment in the clients' favor for $483,875.09. (Pet'r. App. 3.)

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[2] *See* Japan Code of Civil Procedure, Art. 366 (1992 ed.) (Respondent POHL's Appendix ("Resp't. App.") 1); Dominguez's response to POHL's First Request for Admissions No. 27 (Record on Appeal Volume ("R. v.") 3 at 245-46).

[3] In her "Questions Presented for Review" and "Statement of the Case," Dominguez states that "[t]he parties" represented the non-party clients in federal district court. (Pet'r. App. i, 3.) This is not true. POHL did not appear in the federal district court and only entered into the counsel association agreement with Dominguez after the federal district court entered default judgment in August 1993. Nevertheless, the issue is immaterial to the matters raised in the petition because it is undisputed that the association agreement post-dated, by two years, the conclusion of the Tokyo proceeding, including the time to take an appeal.

3. Dominguez's Suit Against POHL

In 2003, Dominguez filed the underlying complaint against POHL that gives rise to the instant petition. Dominguez alleged, in part, that any errors in the handling of her clients' matter were "attributable to the negligence and conduct" of POHL. (Pet'r. App. 4.) POHL counterclaimed, in part, for breach of their counsel agreement in which Dominguez had promised but failed to carry her own professional liability insurance. (Pet'r. App. 4.)

The parties filed several motions for summary judgment. One of POHL's motions sought summary judgment on the entirety of Dominguez's First Amendment Complaint. (Pet'r. App. 5.) POHL argued that it was entitled to summary judgment because the record was undisputed that, as admitted by Dominguez, there was absolutely nothing POHL could have done as of February of 1994 to undo Dominguez's legal malpractice. (R. v.3 at 51). In particular, it was undisputed that (1) a Tokyo court had earlier absolved the Japanese corporation for any liability arising from the clients' injuries; and (2) the corporation's only known assets were in Japan. (R. v.3 at 60-64). In support of its motion, POHL relied on (1) provisions of Japan's Code of Civil Procedure ("JCCP"); (2) a decision from the United States District Court for the District of Massachusetts;[4] (3)

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[4] *See LinkCo, Inc. v. Nichimen Corp.*, 164 F. Supp. 2d 203 (D. Mass. 2001).

legal articles on Japanese law, including the JCCP; and (4) several documents filed in the Tokyo proceeding to establish that by the time POHL associated with Dominguez in 1994 (or even earlier in 1993 as Dominguez contends), it was too late to undo the 1992 Tokyo declaratory judgment absolving the Japanese corporation of liability. Because all of the corporation's known assets were in Japan, the Japanese declaratory judgment acted to effectively prohibit any execution on those assets in Japan under the federal district court's default judgment.

The trial court agreed and granted POHL's motion entering summary judgment in its favor from which Dominguez appealed to the Intermediate Court of Appeals.[5]

4. The Opinion Below

Dominguez asserted seven points of error on appeal before the Intermediate Court of Appeals. (*See* Pet'r. App. 6-7.) Only the first pertained to matters raised by the present petition. The asserted error did not raise any express federal questions, including issues of federal constitutional law. It stated:

> (1) "The Court erred in admitting arguments and evidence of [POHL] as to

---

[5] Dominguez also appealed from trial court rulings granting and denying additional motions for summary judgment on POHL's counterclaims and for attorneys' fees. None of these rulings is the subject of the current petition. (*See* Pet'r. App. 4-6.)

> Japan law, orders and judgment, overruling [Dominguez's] Objections of [POHL's] failure to plead these affirmative defenses, erred in admitting Japan exhibits that were not properly authenticated and erred in taking 'judicial notice' of Japanese law, erred in the correct application of U.S. and Japan laws."

(Pet'r. App. 6. (brackets in original))

The Intermediate Court of Appeals affirmed the trial court's ruling in an unpublished summary disposition order.[6] The appellate court held that "[t]he circuit court did not err in its consideration of Japan law or its reliance on certain exhibits related to the Japan action, and did not further err in granting POHL summary judgment as to Dominguez's [First Amended Complaint]." (Pet'r. App. 8.) The appellate court explained that under Hawai'i law, POHL was not required to plead "Japan law and/or the Japan action as an affirmative defense, since those matters were used to negate the causation element of Dominguez's claims against POHL." (Pet'r. App. 8.)

The appellate court also held that the trial court "did not abuse its discretion in taking judicial notice of Japan law pursuant to Hawai'i Rules of Evidence (HRE) Rule 202 and Hawai'i Rules of Civil Procedure

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[6] The Intermediate Court of Appeals also granted in part and reversed in part the additional rulings from which Dominguez appealed. (*See* Pet'r. App. 10-18.) Again, none of these rulings is the subject of the current petition.

(HRCP) Rule 44.1." (Pet'r. App. 8.) The court held that the trial court "properly considered the Japan judgment, since that judgment was admissible pursuant to HRE Rule 902(3)." (Pet'r. App. 9.) The court further noted that under Hawai'i law, the trial court properly considered a letter from Dominguez's office to the Tokyo court acknowledging receipt of the Tokyo complaint because Dominguez did not dispute the letter's content and submitted a copy in support of her summary judgment opposition. (Pet'r. App. 9.) To the extent Dominguez disputed the authenticity of any other documents relating to the Tokyo action, the documents were not essential to the trial court's ruling and thus, even assuming they were not admissible, any error was harmless. (Pet'r. App. 9.)

Finally, the court of appeals held that Dominguez "failed to raise a material question of fact as to whether POHL caused the damages claimed by Dominguez," and in light of "the Japan judgment and its effect under Japan law, there is nothing in the record establishing that POHL could have executed the U.S. District Court judgment in Japan." (Pet'r. App. 9.)

The appellate court reviewed no federal questions, including questions of due process now advanced by Dominguez. The court stated "[a]ny other arguments raised by Dominguez that are not specifically addressed herein are without merit." (Pet'r. App. 8 n.5.)

On September 1, 2009, the Hawai'i Supreme Court rejected Dominguez's application for a writ of certiorari. (Pet'r. App. 34.)

ARGUMENT

The Hawai'i Intermediate Court of Appeals' unpublished summary disposition order is correct. It does not present any questions of federal constitutional or statutory law and does not conflict with any decisions of this Court or of federal courts of appeal or state supreme courts. It turns exclusively upon application of Hawai'i state law. Further review is therefore not warranted.

I. THE COURT LACKS JURISDICTION OVER THE PETITIONED MATTER

Dominguez has not properly invoked the Court's jurisdiction under 28 U.S.C. section 1257(a).

A. Dominguez Did Not Properly Present Any Federal Question

Dominguez never properly raised any federal question before the state appellate court. Her sole point of error on appeal to that court (Point No. 1) respecting the matters presented by this petition was devoid of any express references to federal questions.

(Pet'r. App. 6.)[7] Hawai'i Rules of Appellate Procedure, Rule 28(b)(4) requires that an opening brief contain a "concise statement of the points of error set forth in separately numbered paragraphs" and "[p]oints not presented in accordance with the section will be disregarded. . . ." *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 171, 172 P.3d 471, 483 (2007) ("these arguments have not been preserved as they have not been presented as points of error" [and] "[a]ccordingly, we do not address them") (citing Haw. R. App. P. 28(b)(4)).

The challenged intermediate appellate court ruling never mentioned any question of federal law. As noted, *supra*, it stated "[a]ny other arguments raised by Dominguez that are not specifically addressed herein are without merit." (Pet'r. App. 8 n.5.) Dominguez's assertion that the "Court below *admits* that [Dominguez] presented her federal issues in the 'correct application of the U.S. and Japan laws' and enumerated assigned errors" (Pet'r. 6 (citing Pet'r. App. 6-7) (emphasis in original)) is incorrect. A review of the appellate decision, including the cited pages, shows no reference to a federal question. The mere fact that a foreign country's laws and legal proceedings were relied on to negate causation does not *ipso facto* mean a federal question is present.

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[7] Indeed, Dominguez's questions presented for review in the instant petition do not make express reference to any question of federal law.

It "is essential to the jurisdiction of the Supreme Court under [28 U.S.C. section] 1257(a) that a substantial federal question has been properly raised in the state court proceedings." Eugene Gressman et al., *Supreme Court Practice* § 3.16, at 180-81 (9th ed. 2007). This Court has made clear that where, as here, "the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had 'a fair opportunity to address the federal question. . . .'" *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (internal citations omitted). As this Court further noted, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90 (internal citation omitted). So too here, where Dominguez failed to raise a substantial federal question, much less any federal question, before the highest state court hearing her case, she has waived any opportunity to do so. The result leaves this Court without jurisdiction under 28 U.S.C. section 1257(a) to review the judgment of the Hawai'i Intermediate Court of Appeals. Her petition of writ of certiorari, accordingly, should be denied.[8]

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[8] Insofar as Dominguez might claim she made direct or indirect reference to the Fifth or Fourteenth Amendments in one of her appellate briefs, as she appears to do at page 5 of her Petition, she has not established a proper record for purposes of

(Continued on following page)

B. Dominguez's Questions Raise Only State Law Matters

Even had Dominguez made a colorable effort to raise a federal constitutional claim before the Intermediate Court of Appeals – which she clearly did not – her claims nevertheless would have turned only on state law. Her questions presented for review and their related arguments, for example, show only state, not federal, questions, as in the case of her questions asking whether the trial court (1) properly admitted certain foreign court records under Hawai'i Rules of Evidence; (2) properly took judicial notice of Japanese law under those same evidence rules; and (3) properly concluded that Hawai'i law on *res judicata* was not implicated by Dominguez's causation argument based on the foreign records and law. The appellate court considered none in the context of a federal question analysis. No matter what federal gloss Dominguez belatedly tries to put on these issues, they were first and last purely issues of state law. They present no federal questions of any kind or dimension. Jurisdiction, accordingly, under 28 U.S.C. section 1257(a) is lacking and the petition should be denied.[9]

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this Court's review. *See Live Oak Ass'n v. R.R. Comm'n State of Cal.*, 269 U.S. 354, 357-58 (1926).

[9] Dominguez's citation to 28 U.S.C. section 1741 (Pet'r. 9) which, in turn, authorizes admission of an official record of a foreign country in the manner prescribed by the Federal Rules of Civil Procedure, does not create a federal question as the

(Continued on following page)

II. THE STATE INTERMEDIATE APPELLATE COURT DID NOT ERR IN APPLYING HAWAI'I LAW

The nub of this petition is whether the Hawai'i Intermediate Court of Appeals correctly held that a default declaratory judgment entered by the Tokyo District Court against Dominguez's non-party clients could be used to deny Dominguez's claims against POHL that it negligently failed to correct her misfeasance and nonfeasance that exposed her clients to the foreign judgment. Dominguez assigns error because the ruling (1) improperly recognized, and took judicial notice of, the effect of the Tokyo judgment; (2) impermissibly applied that effect to find that Dominguez could not establish a required element of her claim (causation) against POHL; and (3) failed to recognize the foregoing as an improperly pled affirmative defense. There was no error in these

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evidentiary issues raised by Dominguez here arose in a state proceeding governed by state rules of evidence, including rules pertaining to the authentication of foreign public records. As a result, the cited federal statute was not directly implicated. *See generally Danforth v. Minnesota*, 552 U.S. 264, ___, 128 S.Ct. 1029, 1041 (2008) ("[t]he fundamental interest in federalism that allows individual States to define . . . rules or evidence, and rules of . . . civil procedure in a variety of different ways – so long as they do not violate the Federal Constitution – is not otherwise limited by any general, undefined federal interest in uniformity"). For the same reason, Dominguez's reliance on Federal Rule of Civil Procedure, Rule 902(3), and presumably its interpretative federal law (Pet'r. 9) is inapposite to the decisions of the state court below.

rulings, each of which rested on Hawai'i, not federal law.

A. The Tokyo District Court Pleadings Were Properly Admitted

Three documents from the Tokyo proceeding were relied upon by POHL in its motion for summary judgment, *viz.*, the complaint, the default declaratory judgment, and evidence that the judgment had been served on the non-party clients. The judgment and evidence of service were each certified on November 9, 2005 by the clerk of the Tokyo District Court. (R. v.3 at 266-69, 281-83.) The Japanese language version of the complaint, although not certified, had been submitted by Dominguez with an English language translation as a true and accurate copy in support of her opposition to POHL's motion for summary judgment. (R. v.4 at 145-46, 228-37, 238-40.)

The Intermediate Court of Appeals correctly held that the judgment was properly considered by the trial court under Hawai'i Rules of Evidence, Rule 902(3). (Pet'r. App. 9.) That Rule provides for self-authentication of foreign public documents purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to do so. (Resp't. App. 1-2.) Additionally, the requirement of a certification is unnecessary "[i]f reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents. . . ." (Resp't. App. 2.)

Below, Dominguez objected to the documents on grounds that POHL's counsel had no "personal knowledge" of them (R. v.4 at 149) but presented no evidence to place in question their authenticity or the accuracy of the English language translations despite ample opportunity to so investigate. This state law evidentiary ruling, aside from lacking any federal question component, was correct and is simply not a cert-worthy matter for the Court's review.

So too, there is nothing cert-worthy about the appellate court's holding that the Tokyo complaint was properly considered by the trial court given the absence of any dispute as to its contents because it had been offered by both Dominguez and POHL. (Pet'r. App. 9.) The correctness of this state law ruling speaks for itself.

B. The Trial Court Properly Took Notice Of Japanese Law

Dominguez's additional state law challenge to the appellate court's affirmance of the trial court's judicial notice of Japanese law is also unavailing and not cert-worthy. The appellate court properly held that under Hawai'i's abuse of discretion standard for discretionary evidentiary rulings, the trial court properly took judicial notice of Japanese law as it related to the impact of the Tokyo District Court's default judgment on the feasibility, if any, of POHL trying to execute on her client's federal district court default

judgment in Japan. (Pet'r. App. 8.) The appellate court relied on Hawai'i Rules of Civil Procedure, Rule 44.1 and Hawai'i Rules of Evidence, Rule 202. (Pet'r. App. 8.)

Under Hawai'i law, Hawai'i Rules of Evidence, Rule 202(c)(5) (Resp't. App. 3) authorizes a court to take optional judicial notice of "the laws of foreign countries, international law, and maritime law." *See Roxas v. Marcos*, 89 Hawai'i 91, 117 n.16, 969 P.2d 1209, 1235 n.16 (1999) ("[t]his court may take judicial notice of the law of foreign countries" under Hawai'i Rules of Evidence, Rule 202(c)(5)). Under Hawai'i Rules of Civil Procedure, Rule 44.1, a "court, in determining foreign law, may consider any relevant material or source, including testimony, *whether or not submitted by a party or admissible* under the Hawai'i Rules of Evidence." (Resp't. App. 3 (emphasis added).) These rules provide broad discretion and authority for a trial court's notice of foreign law. Dominguez has submitted no argument evincing any reasonable grounds warranting further examination of this ruling.

C. The *Res Judicata* Argument Was Properly Rejected

Dominguez's challenge to the appellate court's holding that POHL did not have to affirmatively plead *res judicata* also lacks any justification for this Court's review. The challenge reflects Dominguez's

confusion over the purpose for which POHL relied on the uncontested Japanese declaratory judgment.

The essence of POHL's causation argument was that, by the time it had entered its counsel agreement with Dominguez, there was nothing it could have done to correct Dominguez's negligent failure to defend against the Tokyo action because (1) the Tokyo default judgment had become final and non-appealable; (2) all of the Japanese corporation's known assets were in Japan; and (3) the Tokyo default judgment would have made it impossible to execute the federal district court default judgment on the foreign corporation's assets in Japan.

As the court of appeals correctly determined, POHL was not required to plead Japanese law or the Japanese action as an affirmative defense since "those matters were used to negate the causation element of Dominguez's claims against POHL." (Pet'r. App. 8.) The holding was based on the Hawai'i Supreme Court's ruling in *Bhakta v. County of Maui*, 109 Hawai'i 198, 212, 124 P.3d 943, 957 (2005) ("[a] defense is not affirmative where it 'merely negates an element of the plaintiff's prima facie case'") (citation omitted). Contrary to Dominguez's several arguments on this issue, no federal question of any kind was implicated by the appellate court's clear-cut state law

ruling. It does not warrant further review by the Court.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH J. MANSFIELD
Counsel of Record
R. JOHN SEIBERT
JORDON J. KIMURA
MCCORRISTON MILLER MUKAI
MACKINNON LLP
P.O. Box 2800
Honolulu, HI 96803-2800
(808) 529-7300

[10] Dominguez's argument, for example, that allegedly improper service of the Tokyo complaint and default declaratory judgment on her former clients somehow violated *her* constitutional right (Pet'r. 12) is a non-starter. Even assuming service did not meet federal constitutional due process guarantees, it is immaterial because the causation question below was whether a Japanese court would have allowed Dominguez's clients to enforce their federal district court judgment in Japan. Disposition of that question would have turned exclusively on Japanese law as adjudicated by Japanese courts. Due process considerations required by our federal constitution would have played no role in assessing the foreign sovereign's likely adjudication of this purely Japanese matter.

Respondent's Appendix

JAPAN CODE OF CIVIL PROCEDURE

Article 366. Period for filing koso-appeal

Koso-appeal shall be filed within two weeks from the day of service of the judgment. Provided, That the validity of Koso-appeal filed prior to the foregoing period shall not be lost.

2. The period as mentioned in the preceding paragraph shall be peremptory.

(R. v. 3 at 71, 76 (¶ 20), 248, 249 (¶ 10), 271).

Haw. R. Evid. 902(3). Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating

to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

Haw. R. Evid. 202. Judicial notice of law.

(a) Scope of rule. This rule governs only judicial notice of law.

(b) Mandatory judicial notice of law. The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the U.S. Supreme Court or by the Hawaii Supreme Court, and (4) all duly enacted ordinances of cities or counties of this State.

(c) Optional judicial notice of law. Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all duly adopted federal and state rules of court, (2) all duly published regulations of federal and state

agencies, (3) all duly enacted ordinances of municipalities or other governmental subdivisions of other states, (4) any matter of law which would fall within the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) the laws of foreign countries, international law, and maritime law.

(d) Determination by court. All determinations of law made pursuant to this rule shall be made by the court and not by the jury, and the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules.

Haw. R. Civ. P. 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Hawai'i Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

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(3)

No. 09-632

Supreme Court, U.S.
FILED
JAN 12 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ERLINDA DOMINGUEZ,

Petitioner,

v.

PRICE OKAMOTO HIMENO & LUM, a Law Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Intermediate Court Of Appeals Of The State Of Hawaii

REPLY BRIEF

ERLINDA DOMINGUEZ
P.O. Box 1717
Duarte, CA 91009-4717
(808) 224-8890

Petitioner Pro Se

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENTS	4
A. THIS COURT HAS JURISDICTION	4
B. PETITIONER'S QUESTIONS DID NOT RAISE STATE LAW AS SHOWN BY THE AUTHORITIES HEREUNDER	6
C. PETITIONER RAISED HER FEDERAL QUESTIONS IN THE STATE COURT	8
D. THE JAPAN JUDGMENT WAS NOT PROPERLY ADMITTED	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Abie State Bank v. Bryan, 282 U.S. 765 (1931).....5

Abraham v. S. E. Honorato Garages, 50 Haw. 639, 446 P.2d 821 (1968).....9

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028 (1997).....6

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).....10

Belhater and Cox v. Irmish, 75 F.R.D. 539 (1977).....9

Bremer v. Weeks, 104 Haw. 43 (2004).....9

Cromwell v. County of SAC, 96 U.S. 51 (1877).....10

Danforth v. Minnesota, 128 S.Ct. 1029 (2008) 7

De Saussure v. Gaillard, 127 U.S. 216, 8 S.Ct. 1053 (1888).....2, 5

Donovan v. City of Dallas, 377 U.S. 408 (1964).....6, 7

Exotic Hawaii-Kona, Inc. v. E.I. Dupont DeNemours and Co., 104 Haw. 358 (2004).....9

Flint v. Mackenzie, 53 Haw. 672, 501 P.2d 357 (1972).....9

Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1436 (1999).....5, 6, 7

Hilton v. Guyot, 159 U.S. 113, ___ S.Ct. 139 (1895).....7

TABLE OF AUTHORITIES – Continued

Page

Koven v. Saberdyne Systems, Inc., 128 Ariz. 318, 625 P.2d 907 9

Linkco Inc. v. Nichimen Corp., 164 F. Supp. 2d (2003).....9

Michigan v. Long, 463 U.S. 1032 (1983).....5

Pioneer Mill Co. v. Dow, 90 Haw. 289, 978 P.2d 727 (1999).....8

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).....6

Richards v. Jefferson County, 517 U.S. 797 (1996).....6

Roxas v. Marcos, 89 Haw. 91, 969 P.2d 1209 (1999).....12

Shoei Kako Co. v. Superior Court of California, 33 Cal. App. 3d 808, 109 Cal. Rptr. 102 (1973).....2

State v. Grindling, 96 Haw. 402, 31 P.3d 915 (2001).....10

Taylor v. Sturgell, (US) 128 S.Ct. 2161.....7

Touche Ross, Ltd. v. Filipek, 7 Haw. 473, 778 P.2d 721 (1989).....8

Ward v. Love Country, 253 U.S. 17 (1920).....4

RULES:

Rule 15(2), Supreme Court Rules 1

Rule 202(c)(5), HRE.....12

TABLE OF AUTHORITIES – Continued

Page

Rules 8(c), 9(d)-(e), HRCP 8

Rule 44.1, HRCP.....12

Rule 56, HRCP.....4

FOREIGN AUTHORITIES:

Article 108, Japan Code of Civil Procedure.....8

Article 118, Japan Code of Civil Procedure.....9

INTRODUCTION

Respondent's statements are misleading, even false. The appeal Court ("Court below") did not claim to use "Hawaii law." It simply cited sections of the Hawaii Rules of Civil Procedure and Rules of Evidence. (App. 8, Pet.). These rules are patterned after the federal rules, even identically worded. They are not independent and adequate statutes for Hawaii. Petitioner described the manner she raised her federal issues from the trial court to the appeal court. (App. 4-5, Pet.). Respondent simply concluded that there are no federal questions after its "review of the appellate decision including the cited pages." (p. 9, Opp.). This conclusion is insufficient. Rule 15(2), Supreme Court Rules. Petitioner's federal questions must have been decided, or the Court could not decide, as follows:

> In light of the Japan judgment and its effect under Japan law, there is nothing in the record establishing that POHL could have executed the U.S. District Court judgment in Japan.[1]

Meaning, in addition to the above, the Court decided that the Japan judgment rendered without Japan process is valid; it has authority to restrain enforcement of the federal judgment, decide for a Japan

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[1] On its face, infringement into federal judgments and deciding what a foreign nation should do with federal judgments ARE NOT STATE LAW ISSUES. They are federal questions that involve Constitutional jurisdiction of the Courts.

Court; and *res judicata* has attached to non-parties of the Japan judgment. In her Opposition to the Motion at the trial Court, Petitioner claimed, the State Court cannot infringe upon a federal Court and a Japan Court as she cited *Shoei Kako Co., Ltd. v. Superior Court of California*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 102 (1973). The Hawaii Court "cannot decide what the Japan nation would do if enforcement of the federal judgment is sought," explained this case, to the point. (R., v. 4, at 154). Petitioner's federal questions by "necessary effect" had been decided against her. *De Saussure v. Gaillard,* 127 U.S. 216 (1888). This Court has jurisdiction.

Respondent claims Petitioner's opening brief in the appeal Court is defective. (p. 9, Opp.). It did not complain before, and the Court below did not so find. The decision, in fact, confirms the errors listed therein are not all that Petitioner raised, but everything was considered, as follows:

> Upon careful review of the record and the briefs submitted by the parties and having "given due consideration" to the arguments advanced and the issues raised by the parties, we resolve Dominguez's points of errors as follows:
>
> . . .
>
> Any other arguments "raised" by Dominguez that are not specifically addressed herein are without merit.

(App. 8, Pet.; 2nd paragraph is a "footnote").

That was in addition to what Petitioner raised according to the Court: Issues of "Japan law, orders and judgment"; pleading affirmative defenses and authentication of exhibits; and the "correct application of U.S. and Japan laws". (App. 6, Pet.). The Court below could have said "Hawaii laws", but used "U.S. laws."

Respondent claims as defense the un-appealed 1992 Japan judgment before the parties entered into a counsel agreement in 1994. (pp. 2-3, Opp.). In spite of the evidence on record, 1993 was omitted, before the federal judgment when Respondent was retained and then controlled the case. (R., v. 4, at 242-43; App. 2, Pet.). Respondent resorted to a patently false statement not borne by the records – that Petitioner "admitted" there was absolutely nothing Respondent could have done as of Feb. 1994 to undo her legal malpractice; and it was undisputed that the Tokyo Court absolved the Japanese corporation. (p. 3, Opp.). None was correct. If true, the parties would not be before this Court. The assets of the company are only in Japan, repeatedly states Respondent. (pp. 4, 5, 16, Opp.). This speculation is the result of its own malpractice of failing to locate assets and to enforce the U.S. District Court judgment which even Japan would have recognized under its Code. (App. 39, Pet.).

The clients were not served Japan process and received no Japan judgment. (R., v. 4, at 210-27). There was nothing to appeal in Japan. The purported

authorities of Respondent are to no avail.[2] Respondent claims federal questions must be substantial. (p. 10, Opp.). Petitioner agrees. What could be more substantial than the State Court creating clouds on U.S. District Court judgments and restraining their enforcement prospectively and retroactively; deciding what an independent nation must do; absolving foreign investors from adverse federal judgments; allowing lawyers to be privies of their clients' opponents to a foreign nation's void default judgment.

ARGUMENTS

A. THIS COURT HAS JURISDICTION.

This Court has long recognized that it is within its province to inquire whether a federal right was denied by a state court "in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support," and that this inquiry "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Ward v. Love Country,* 253 U.S. 17, 22-23 (1920). In other words, "it is incumbent upon this Court, when it is urged that the decision of

[2] The Japan judgment was not known, not in evidence in the malpractice trial, clearly shown in the verdict. (R., v. 4, at 148-49).

the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may be appropriately enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931).[3]

In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), the issue was an injunction against sale of trust lands. Respondent therein argued against the jurisdiction of this Court because the Hawaii Court specifically decided "under state law". But this Court held, it has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." It cited *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983), *id.* at 1442. This Court has jurisdiction if the federal question has been, either in express terms or by necessary effect, decided against the Plaintiff in Error. *De Saussure v. Gaillard,* 127

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[3] As discussed in the Petition, the decision below relied on irrelevant local cases "without fair and substantial support." It consisted of impossible or unrealistic facts. It held: The Japan judgment is not an avoidance or affirmative defense, it is simply a "denial of causation"; A past English letter authenticated the future judgment in Japanese language; The admission of the Japan judgment is a "judgment call" of the Judge citing a case of criminal sexual assault where "credibility of the complainant" was in issue – despite rules and case precedents to the contrary. (pp. 7, 9-10, Pet.).

U.S. 216 (1888). Either "raising of the issues" below "or" "decision of the issues" by the appeal Court would give this Court jurisdiction. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Petitioner complied with both. At the very least, the adequacy and independence of any possible state law ground is not clear from the decision of the Court below. Hence, this Court would have jurisdiction. *Hawaii v. Office of Hawaiian Affairs*, supra.

B. PETITIONER'S QUESTIONS DID NOT RAISE STATE LAW MATTERS AS SHOWN BY THE AUTHORITIES HEREUNDER.

Petitioner did more than what the parties did in the following cases. In *Richards v. Jefferson County*, 517 U.S. 797 (1996), citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-87 (1980), this Court held that because petitioners raised their due process challenge to the application of *res judicata* in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review.

The similarity of Petitioner's situation with a case cited in her Petition cannot be ignored. In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), this Court said: "Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented . . . " What is before us is "the propriety of a state court's punishment of a federal-court litigant for pursuing his right

to federal-court remedies . . . That right was granted by Congress and cannot be taken away by the State." *Id.* at 413.

Issue of conflict of laws and foreign judgments is a federal question. The effect to be given to foreign judgments is altogether a matter of comity in cases where it is not regulated by treaty. *Aetna Life Insurance Co.*, 223 U.S. 186 (223), citing *Hilton v. Guyot*, 157 U.S. 166, and other cases. For judgments in federal-question cases, federal courts participate in developing uniform federal rules of *res judicata*, which the United States Supreme Court has ultimate authority to determine and declare. The federal common law of preclusion is subject to due process limitations. *Taylor v. Sturgell* (US) 128 S.Ct. 2161.

Referring to the sovereignty of States to construe Congressional documents and laws, this Court held, "that maxim is not a judicial license to turn an irrelevant statutory provision into a relevant one." . . . "a court has no license to make it do what it was not designed to do." *Hawaii v. Office of Hawaiian Affairs*, supra, at 1444. What the Court below did was more egregious. It ignored relevant decisions and applied irrelevant decisions. (pp. 7, 9, 10, Pet.). Then, it decided for Japan. (App. 9, Pet.).[4]

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[4] In a footnote, Respondent vaguely cited *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008). That case actually said that retroactivity of new rules . . . is a federal question. *Id.* at 1047.

C. PETITIONER RAISED HER FEDERAL QUESTIONS IN THE STATE COURTS.

Petitioner objected to issues of Japan judgment, Order, and Laws because they were not pleaded as mandated by law. (R., v. 4, at 12-14). She had no opportunity to meet the issue.[5] She filed her Opposition quoting Rules 8(c), 9(d)-(e) Hawaii Code of Civil Procedure requiring pleading of any avoidance or affirmative defense, listing *res judicata*, providing the manner to plead them; and she presented Hawaii cases in point including *Touche Ross, Ltd. v. Filipek*, 7 Haw. 473, 778 P.2d 721 (1989). (R., v. 4, at 143-144). Petitioner contested the Japanese exhibits of Respondent as unauthenticated. She presented numerous cases disallowing such evidence including *Pioneer Mill Co. v. Dow,* 90 Haw. 289, 978 P.2d 727 (1999) which held that the affidavit of counsel did not authenticate the exhibits that were not certified by their preparer or custodian. Petitioner presented that the Japan judgment was void for no process served upon the clients and quoted and submitted Art. 108 of the Japan Code of Civil Procedure (JCCP). (R., v. 4, at 150-51; App. 39, Pet.). She argued the validity of the federal judgment. It should not be infringed; It should

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[5] Respondent's Motion for Summary Judgment was filed Dec. 14, 2005. The hearing was on Jan. 19, 2006. The judge did not wish to postpone. She insisted on a non-scheduled "jury trial" for Respondent's damages within a week from her telephone call pending Motions for Reconsideration. She refused recusal for a disclosure after about two years into the case, of her close ties with Respondent's law office. (R., v. 8, at 36-63).

be enforced. She quoted and submitted Art. 118 (JCCP) that would allow enforcement of foreign judgments in Japan. (R., v. 4, at 153-54; App. 39, Pet.). If there was truly a defect in service of the federal lawsuit, that could be cured by a *nunc pro tunc* Order. She cited *Belhalter and Cox v. Irmish*, 75 F.R.D. 539 (1977). Petitioner argued against preclusion, commonly called *res judicata*. She listed the requirements and cited *Bremer v. Weeks*, 104 Haw. 43 (2004); *Exotic Hawaii-Kona, Inc. v. E.I. Dupont DeNemours and Co.*, 104 Haw. 358 (2004). Petitioner claimed that Respondent had no privity, "no standing" to place itself in the position of the Japanese Company. She cited *Koven v. Saberdyne Systems, Inc.*, 128 Ariz. 318, 625 P.2d 907. (*Id.* R. at 159). Petitioner argued there can be no judgment as a matter of law since there are genuine issues of material facts under Rule 56, HRCP. She cited numerous authorities including *Abraham v. S.E. Honorato Garages,* 50 Haw. 639, 446 P.2d 821 (1968). (*Id.* R. at 162). Petitioner claimed summary judgment should be for her. She cited *Flint v. Mackenzie,* 53 Haw. 672, 501 P.2d 357 (1972). She asked for her right to a trial, her "day in court." (*Id.* R. at 162). In her Motion for Reconsideration, Petitioner re-emphasized her points. (R., v. 6, at 1-10). She quoted from Respondent's authority, *Linkco Inc. v. Nichimen Corp.*, 164 F. Supp. 2d (2003). The Court there said the foreign judgment can be discarded where the foreign court lacked subject matter jurisdiction or the foreign judgment conflicts with another final judgment that is entitled to recognition. (*Id.* R. at 6).

In her Opening Brief in the Court below, Petitioner laid out and re-presented all her above issues, in fact, with more authorities. (pp. 22-31, Opening Brief). She argued that Respondent has collaterally attacked the U.S. Court judgment – that which it earned for its clients. The trial court allowed infringement and made "the U.S. judgment to be ineffective" through Respondent's attack "of the U.S. judgment." (p. 31, Opening Brief). She quoted numerous cases including *State v. Grindling*, 96 Haw. 402, 405, 31 P.3d 915, 918 (2001). She argued that the trial Court gave credit to the Japan judgment results in *res judicata*. She laid out the requirements for the doctrine: Identical parties and issues in the Japan case and in this case between the parties, and litigation on the merits in the Japan case. All such requirements were missing. She cited relevant decisions of this Court such as *Cromwell v. County of SAC*, 96 U.S. 51 (1877) discussing *res judicata* or judgment estoppel and due process; and *Allstate Ins. Co. v. Hague,* 449 U.S. 302 (1981) discussing requirements for full faith and credit similar to *res judicata*. A foreign nation is not in a better position than a sister State. (pp. 29-30, Opening Brief). In her Reply Brief, she re-presented *res judicata* and called the Court's attention to the absence of counter-arguments on this issue and on the adjudged malpractice errors of Petitioner. (pp. 7-8, Reply). In her Motion for Reconsideration in the Court below, she again asked for a reversal, for her Constitutional right to a trial. (pp. 1-7, Motion for Recon.). She re-presented her issues to

the State Supreme Court, and the petition was denied. (App. 34, Pet.).

D. THE JAPAN JUDGMENT WAS NOT PROPERLY ADMITTED.

In its Counterstatement of Questions Presented, Respondent presents a new issue – that the foreign "pleadings and law" (not Japan judgment) negated the causation element of Petitioner's claim. The issue is clear: Is the "Japan judgment" valid, and be a bar of the federal judgment, applied against Petitioner and in favor of Respondent who were both strangers to the judgment? This is a *res judicata* issue.

Respondent resorts to another patently false or misleading statement: that the Japan judgment and the evidence of service were each certified on Nov. 9, 2005 by the clerk of the Tokyo District Court. (p. 13, Opp.). The exhibit of Respondent was just an UNSIGNED, UNSEALED AND UNATTESTED print. (R., v. 3, at 266-69; 281-83). Or, Kuwahara's letter was not needed to "prophesize." Respondent and the lower Court claim that the letter to Japan and the Tokyo Complaint were "offered" by both parties. (p. 14, Opp.). This statement is untrue and unjust. Petitioner only made reference to those documents for her arguments. For instance, she stressed that the letter of Kuwahara to the Japan Court informing them of the pendency of the federal case stated, "Finally, this letter is not to be construed as a pleading and Mr. and Mrs. Barnedo's appearance and their submission to

this Court." (R., v. 3, at 127-29). Respondent states that certification is unnecessary if a reasonable opportunity was given to investigate. (p. 13, Opp.). The Motion is not a reasonable opportunity, which is why the rules need pleading of the judgment. The Judge never allowed Petitioner any opportunity explained above. (R., v. 8, at 36-63).

Respondent cites a single Hawaii case in regard to judicial notice of laws of foreign countries under the Rule 202(c)(5) Hawaii Rules of Evidence, and Rule 44.1, Hawaii Rules of Civil Procedure. *Roxas v. Marcos*, 89 Haw. 91, 117, 969 P.2d 1209, 1235 (1999). (p. 15, Opp.). But the Court there did not apply either rule. It had no opportunity to test and construe because "the parties never addressed Philippine law." Instead, the decision there mentioned the requirements for estoppel by judgment as a bar or preclusion: identity of parties and issues, and judgment on the merits in the first case. *Id.* at 119; 1237.

CONCLUSION

The Petition should be granted. Nothing appears in the decision below as to the adequacy and independence of any possible State Hawaii law. The issues are clearly federal, raised, and had to be included in the decision below.

Respectfully submitted,

ERLINDA DOMINGUEZ
Petitioner Pro Se